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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 31

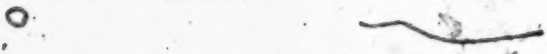
THE UNITED STATES, PETITIONER

vs.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED FEBRUARY 27, 1942
CERTIORARI GRANTED APRIL 13, 1942



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 982

THE UNITED STATES, PETITIONER

vs.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 43269

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC., A BODY CORPORATE

vs.

THE UNITED STATES

I. *History of proceedings*

The original petition was filed February 19, 1936.

On April 4, 1938, on motion made therefor, and allowed by the court, the plaintiffs filed their amended petition which is as follows:

II. *Amended petition*

Filed April 4, 1938

To the Honorable Judges of the Court of Claims of the United States:

Plaintiffs, Fred J. Rice and W. Cameron Burton, Receivers for D. C. Engineering Company, Inc., a body corporate, respectfully represent:

1

Plaintiffs, Fred J. Rice and W. Cameron Burton, are the duly qualified and acting Receivers of the D. C. Engineering
2 Company, Inc., a body corporate, appointed by order of the Supreme Court of the District of Columbia, in Equity Cause No. 56,546, dated February 7, 1934, and by further order of said Court, dated July 5, 1934, said Receivers are authorized and directed to institute this suit.

2

The D. C. Engineering Company, hereinafter called plaintiff Company, was incorporated under the laws of the District of Columbia, having its principal office and place of business in the City of Washington, District of Columbia, and its officers and stockholders are citizens of the United States.

Plaintiff Company has at all times borne true faith and allegiance to the Government of the United States of America and has in no way aided or abetted or given encouragement to rebellion against said Government.

3

As the result of successful bids submitted to defendant, plaintiff Company executed and entered into a contract with the defendant, dated April 29, 1932, the defendant being represented in the making and execution thereof by L. H. Tripp, Director of Construction, Veterans' Administration, called the Contracting Officer, for "the complete installation at Veterans' Administration Home, Togus, Maine, of Plumbing, Heating, and Electrical Work, including all Outside Distribution Systems, excepting outside sewers and heating," at the stated contract price of Eighty-nine Thousand Five Hundred Dollars ($89,500.00). By subsequent changes in said contract in which certain additions to and deductions from the original contract price were mutually agreed upon between the parties, said contract price was reduced by Eleven Hundred Twenty-one Dollars and Eighteen Cents ($1,121.18), to a total of Eighty-eight Thousand Three Hundred Seventy-eight Dollars and Eighty-two Cents ($88,378.82).

4

Plaintiff Company fully and completely performed in accordance with the provisions of said contract and the specifications, schedules, and drawings forming a part thereof, all of the work required to be done thereunder, which was duly accepted by the defendant. Whereupon, plaintiff Company became entitled to the full amount of compensation fixed and agreed upon in and by said contract, as amended, to wit, Eighty-eight Thousand Three Hundred Seventy-eight Dollars and Eighty-two Cents ($88,378.82), in addition to further amounts hereinafter set forth.

5

Said contract of April 29, 1932, provided, among other things, that "The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided in the contract for General Construction."

Said notice to proceed, as contemplated in said contract, was given by letter of the Veterans' Administration, signed by said L. H. Tripp, the Contracting Officer, to the L. C. Engineering Company, dated May 12, 1932, reading as follows:

"You are hereby notified to proceed with the installation of Plumbing, Heating, and Electrical Work at Veterans' Administration Hospital, Togus, Maine, as contemplated by Contract VAc-196, dated April 29, 1932, your copy of which is attached. The performance bond signed by you and the Globe Indemnity

Company, 150 William Street, New York City, N. Y., in support of this contract, has been approved and is on file with the Service record of this agreement.

4 "It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1932."

6

Pursuant to said notice, plaintiff Company made immediate preparations for commencement of work under the contract and on June 4, 1932, plaintiff's superintendent in charge of said job established offices in Togus, Maine, and on or about said date large supplies of materials, tools, and working equipment were forwarded to Togus, Maine. Plaintiff Company was prepared to immediately commence and diligently prosecute its work under said contract on said date.

However, because of faulty foundations, a condition over which plaintiff Company had no control and for which the defendant was responsible, requiring a complete relocation of the building and necessitating numerous changes in the plans and specifications, actual construction work on said building could not and did not commence until October 8, 1932.

During the period from June 4, 1932, to October 8, 1932, plaintiff Company was required to and did remain on the job and hold itself in readiness to commence construction work at any time. Despite numerous and repeated requests by plaintiff Company of defendant and its Contracting Officer, for instructions and information as to the commencement of construction work, no definite information or instructions were received, other than said notice of May 12, 1932, to commence work immediately, but it was impossible for plaintiff Company to commence its work until October 8, 1932, when general construction work on the building was started.

5 7

As the result of said delay in the commencement of building construction, for which plaintiff Company was not in any wise responsible and which was in violation of said contract and constituted a breach thereof by defendant, plaintiff Company suffered severe loss and damage, by reason of the necessity for maintaining its staff and equipment at Togus, Maine, during the period from June 4, 1932, to October 8, 1932, and by reason of the fact that whereas said contract contemplated the completion of the outside work, on said building

during the summer and fall months of 1932, said work was commenced and continued during the severe winter months, at considerable additional expense and cost to plaintiff Company, all to the loss and damage of plaintiff Company in the sum of Twenty-nine Thousand Six Hundred Twenty-five Dollars and Fifteen Cents ($29,625.15).

8

Plaintiff Company performed said work under said contract and said work was accepted by the defendant, acting through its officers and agents authorized to accept the same, and the defendant received and has ever since enjoyed the benefit thereof at the expense of and damage to plaintiff Company. Plaintiffs aver that defendant is responsible for all of the expense and costs to which plaintiff Company was subjected, as hereinabove set forth, whereby and by reason of which an obligation arose and still exists on the part of defendant to pay plaintiff Company just and reasonable compensation therefor. Plaintiff Company, however, has not been paid for on account of any of said expense and costs.

9

Said contract of April 29, 1932, further provided in Article 9 thereof for the assessment of liquidated damages in the amount fixed by the specifications, at $70.00 per day, for each day the completion of said building was delayed by the plaintiff Company. Article 9 provided for the determination of said liquidated damages as follows:

"Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto."

10

Upon completion and acceptance of said building on October 21, 1933, the time for completion thereof under the contract having been extended by defendant to August 14, 1933, final payment was made to plaintiff Company in the sum of Seven Thousand Six Hundred and eight Dollars and Eighty-seven Cents ($7,608.87), representing a total payment to plaintiff Company on said job of Eighty-six Thousand Four Hundred Eighteen Dollars and Eighty-two Cents ($86,418.82), the sum of Nineteen Hundred and Sixty Dollars ($1,960.00) having been deducted from the final payment due plaintiff Company
7 as liquidated damages for twenty-eight (28) days delay under said paragraph 9 of the contract.

Plaintiffs aver that plaintiff Company was not in any manner responsible for the alleged delay of twenty-eight (28) days for which said erroneous and wrongful deduction of Nineteen Hundred and Sixty Dollars ($1,960.00) was made. Plaintiffs aver that said delay was due to unforeseeable causes beyond the control and without the fault of plaintiff Company, as admitted by letter received by plaintiff Company from the Veterans' Administration, signed by said L. H. Tripp, the Contracting Officer, dated October 21, 1933, reading in whole as follows:

"Under contract VAc–196 dated April 29, 1932, you were required to install the Plumbing, Heating, and Electrical Work specified in connection with buildings constructed under contract VAc–193 by Morley Construction Company (Chas. Smith & Sons Construction Co.), contractor for the General Construction work at Veterans' Administration Facility, Togus, Maine, and to complete the work at a date not later than that provided for in the contract for General Construction, which was originally January 14, 1933, and has been extended to August 14, 1933. It is noted that your progress was delayed by the General Construction work and that your contract work was not completed until October 1, 1933.

"Under Article 9 of the contract, I have ascertained the facts and extent of this delay and find (1) that the nature of your contract work was such that it could not proceed at a more rapid rate than the general construction work which was being performed by the Government under contract VAc–193, (2) that your contract work was completed October 1, 1933, which is the date when the general construction work was completed, and (3) that the entire delay in the completion of your contract work, amounting to Forty-Eight (48) Calendar Days after
8 August 14, 1933, was caused by the General Construction

work which was being performed for the Government under contract VAc-193, thus constituting a delay due to unforeseeable causes beyond your control and without your fault or negligence."

Plaintiffs, therefore, claim of the defendant the further sum of Nineteen Hundred and Sixty Dollars ($1,960.00) for said wrongful deduction on account of alleged liquidated damages.

11

Neither plaintiffs nor plaintiff Company have made any assignment or transfer of the claim referred to herein or any part thereof or interest herein and plaintiffs are entitled to the full amount claimed after making proper allowance for all just credits and set offs.

Wherefore plaintiffs claim that they are justly entitled to recover the sum of Thirty-one Thousand Five Hundred Eighty-five Dollars and Fifteen Cents ($31,585.15), and accordingly pray judgment in their favor against the United States for said amount.

FRED J. RICE,
W. CAMERON BURTON,
Receivers for the D. C. Engineering Company, Inc.

9 [*Duly sworn to by W. Cameron Burton; jurat omitted in printing.*]

Construction contract dated April 29, 1932, between Veterans' Administration and The D. C. Engineering Company, Inc.

10 Standard Form No. 23. VAc-196
Approved by the President.
Nov. 19, 1926.

STANDARD GOVERNMENT FORM OF CONTRACT

(Construction)

VETERANS' ADMINISTRATION
(Department)

THE D. C. ENGINEERING COMPANY, INC.,
(Contractor)

1400 Spring Road, NW., Washington, D. C.

Contract for Plumbing, Heating, and Electrical Work,
Amount: $89,500.00

Place: Veterans' Administration Home, Togus, Maine

April 29, 1932

CONTRACT FOR CONSTRUCTION

This Contract, entered into this Twenty-ninth day of April 1932, by The United States of America, hereinafter called the Government, represented by the contracting officer executing this contract, and The D. C. Engineering Company, Inc., a corporation organized and existing under the laws of the District of Columbia, of the city of Washington, in the District of Columbia, hereinafter called the contractor, witnesseth that the parties hereto do mutually agree as follows:

ARTICLE 1. Statement of work.—The contractor shall furnish all labor and materials, and perform all work required for the complete installation at Veterans' Administration Home, Togus, Maine, of Plumbing, Heating, and Electrical Work, including all Outside Distribution Systems, excepting outside sewers and
11 heating, for the consideration of Eight-nine Thousand Five Hundred Dollars ($89,500.00) in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specifications for Hospital Building for Veterans' Administration Home at Togus, Maine, March 12, 1932, and the schedules and drawings mentioned therein; Addendum No. 1 dated April 6, 1932; as contemplated by Item II of the Contractor's proposal dated April 19, 1932, and letter of acceptance dated April 29, 1932.

The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for General Construction.

ARTICLE 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided. Upon completion of the contract the work shall be delivered complete and undamaged.

ARTICLE 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly.

12 No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

ARTICLE 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

ARTICLE 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction.

Rejected workmanship shall be satisfactorily corrected and
13 rejected material shall be satisfactorily replaced with

proper material without charge therefor, and the contractor shall promptly segregate and remove the same from the premises.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, wherever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures
14 from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

ARTICLE 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting offi-

cer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to dismiss from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable.

ARTICLE 8. Superintendence by contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

ARTICLE 9. Delays—Damages.—If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in Article 1, or any extension thereof, or fails to complete
15 said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: Provided, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor,

including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: Provided further, That the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within thirty days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay shall be final and conclusive on the parties hereto.

ARTICLE 10. Permits and care of work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

ARTICLE 11. Eight-hour law—Convict labor.—(a) No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of five dollars shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided, That this stipulation shall be subject in all respects to the exceptions and provisions of the act of June 19, 1912 (37 Stat. 137), relating to hours of labor.

(b) The contractor shall not employ any person undergoing sentence of imprisonment at hard labor.

ARTICLE 12.—Covenant against contingent fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona

fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

ARTICLE 13.—Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ARTICLE 14. Officials not to benefit.—No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ARTICLE 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such questions of fact. In the meantime the contractor shall diligently proceed with the work as directed.

ARTICLE 16. Payments to contractors.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 per cent on the estimated amount until final completion and acceptance of all work covered by the contract: Provided, however, That the contracting officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the con-

tractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

ARTICLE 17. Additional security.—Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

ARTICLE 18. Definitions.—(a) The term "head of department" as used herein shall mean the head of the executive department or independent establishment involved, and "his representative" means any person authorized to act for him other than the contracting officer.

(b) The term "contracting officer" as used herein shall include his duly appointed successor or his duly authorized representative.

ARTICLE 19. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

19 In witness whereof, the parties hereto have executed this contract as of the day and year first-above written.

THE UNITED STATES OF AMERICA,

By L. H. TRIPP,

Director of Construction, Veterans Administration.

(Official title)

L. A. WARREN,

Attest:

F. R. PITMAN, *Secretary.*

[CORPORATE SEAL] THE D. C. ENGINEERING CO., INC.,

Contractor.

H. E. HUNTSBERRY, *President,*

1400 Spring Road N. W., Washington, D. C.

(Business address)

I, F. R. Pitman, certify that I am the secretary of the corporation named as contractor herein; that H. E. Huntsberry,

who signed this contract on behalf of the contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

F. R. PITMAN. [CORPORATE SEAL]

I hereby certify that, to the best of my knowledge and belief, based upon observation and inquiry, ——— who signed this contract for the ——— had authority to execute the same, and is the individual who signs similar contracts on behalf of this corporation with the public generally.

Contracting Officer.

This contract is authorized by the acts of World War Veterans' Act, 1924, as amended.

20 Directions for Preparation of Contract

1. This form shall be used for every formal contract for the construction or repair of public buildings or works, but its use will not be required in foreign countries.

2. There shall be no deviation from this standard contract form, except as provided for in these directions, without prior approval of the Director of the Bureau of the Budget obtained through the Interdepartmental Board of Contracts and Adjustments. Where interlineations, deletions, additions, or other alterations are permitted, specific notation of the same shall be entered in the blank space following the article entitled "Alerations" before signing. This article is not to be construed as general authority to deviate from the standard form. Deletion of the descriptive manner not applicable in the preamble need not be noted in the article entitled "Alterations."

3. The blank space of Article 1 is intended for the insertion of a statement of the work to be done, together with place of performance, or for the enumeration of papers which contain the necessary data.

4. If it is deemed necessary to include an article on Patents the Invitation to Bidders shall so state and the following article be used:

ARTICLE —. Patents.—The contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, or appliance furnished or used in the performance of this contract, excepting patented articles required by the Government in its specification, the use of which the contractor does not control.

5. Where only one payment is contemplated, upon completion of the contract, all except paragraph (d) of Article 16, "Payments to Contractor," must be stricken out.

21 6. If approval of the contract is required before it shall become binding, the following article must be added:

ARTICLE —. Approval.—This contract shall be subject to the written approval of ———, and shall not be binding until so approved.

Contracts subject to approval are not valid until approved by the authority designated to approve them, and the contractor's copy will not be delivered, nor any distribution made, until such approval. All changes and deletions must have been made before the contract is forwarded for approval.

7. The number of executed copies and of certified copies, designation of disbursing officer, statement of appropriation, amount of bond, designation of place of inspection, as well as other administrative details, shall be as directed by the department to which the contract pertains.

8. All blank spaces must be filled in or ruled out. The contract must be dated, and the bond must bear the same or subsequent date.

9. An officer of a corporation, a member of a partnership, or an agent signing for the principal, shall place his signature and title after the word "By" under the name of the principal. A contract executed by an attorney or agent on behalf of the contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the contractor.

10. If the contractor is a corporation, one of the certificates following the signatures of the parties must be executed. If the contract is signed by the secretary of the corporation, then the first certificate must be executed by some other officer of the corporation under the corporate seal, or the second certificate executed by the contracting officer. In lieu of either of the foregoing certificates there may be attached to the contract copies of so much of the records of the corporation as will show the official character

22 and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

11. The full name and business address of the contractor must be inserted, and the contract signed with his usual signature. Typewrite or print name under all signatures to contract and bond.

12. The contracting officer must fill in the citation of the act authorizing the contract as indicated at the end of the last page of the contract.

13. The Invitation, Bid, Acceptance, and Instructions to Bidders are not to be incorporated in the contract.

14. The specifications should include a paragraph stating the amount of liquidated damages that will be paid by the contractor for each calendar day of delay, as indicated in Article 9 of the contract.

23 *III. General traverse*

Filed May 14, 1938

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

SAMUEL E. WHITAKER,
Assistant Attorney General.

G. F. F.

IV. Argument and submission of case

On February 6, 1941, the case was argued and submitted on merits by Mr. R. A. Bogley for plaintiffs, and by Mr. Elihu Schott for defendant.

25 *V. Special findings of fact, conclusion of law and opinion of the court by Littleton, J.; concurring opinions by Green, J., and Whaley, Ch. J.; dissenting opinion by Madden, J.*

Filed December 1, 1941

Mr. R. Aubrey Bogley for the plaintiffs.

Messrs. McKenney, Flannery & Craighill were on the brief.

Mr. Elihu Schott, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant.

Mr. Rawlings Ragland was on the brief.

Plaintiffs, as receivers, seek to recover $26,044.64 representing the total loss sustained by the D. C. Engineering Company under its contract with defendant for furnishing and installing plumbing, heating, and ventilating equipment at the Veterans' Administration Hospital Building constructed by the defendant under a separate contract at Togus, Maine.

The theory upon which plaintiffs seek to recover the amount stated is that defendant had agreed and was obligated to prepare the site and to construct the building in which the D. C. Engineering Company was to perform the work called for by its contract

within 250 days after commencement of construction operations in the spring of 1932; that inasmuch as the building was not ready for the work to be performed therein by the D. C. Engineering Company until October 8, 1932, or 149 days after plaintiff had been given notice to proceed, and plaintiff was further de-
26 layed for an additional period of 48 days at the end of the construction program, which required a total of 510 days, or 260 days in excess of the originally fixed period, the defendant is liable under its contract with the D. C. Engineering Company for the total excess cost of $26,044.64 alleged to have been caused by this delay.

Special findings of fact

1. Plaintiffs are the receivers of the D. C. Engineering Co., Inc., a District of Columbia corporation, having been duly so appointed by the Supreme Court of the District of Columbia February 7, 1934, and by that court authorized to institute and prosecute this suit.

Prior to March 12, 1932, the Government, through the Veterans' Administration, decided to construct a large Veterans' Hospital at Togus, Maine, known as Veterans' Administration Home, and to do all work necessary to complete the project by separate contracts for (1) general construction; (2) plumbing, heating, and electrical work; (3) electric elevators; and (4) a refrigerating plant. Accordingly, detailed specifications and drawings were prepared by the Government through the Veterans' Administration construction service for the four classes of work mentioned. The specifications for the entire project were in one volume. The general conditions set forth in the specifications were applicable to each contract to be entered into between the Government and the successful bidder for each classification of work, the single standard form of contract to be separately executed by each successful bidder for the classification of work covered by his bid, and the detailed specifications applicable thereto. The plans and drawings for the entire work to be performed by all the contracts with the Government either accompanied the specifications or were made available to all bidders. The standard form of contract subsequently entered into between the Government and each successful bidder contained at the time of execution only such additions as were necessary to describe the nature of the work to be performed thereunder and the contract price therefor.
27 March 12, 1932, an invitation for bids was prepared and issued in a single document for the four classifications of work, a copy of which, together with all the specifications for the entire project, was furnished to prospective bidders. This invitation for bids, so far as pertinent here, was as follows:

Sealed bids, in triplicate, subject to the conditions contained herein, will be received by the Veterans' Administration April 19, 1932, and then publicly opened for furnishing all labor and materials and performing all work required for constructing and finishing complete at Veterans' Administration Home, Togus, Maine, Hospital Building. This work will include excavating, roads, walks, and drainage, reinforced concrete, hollow tile, brickwork, cut stone, architectural terra cotta, slate stair treads, marble work, terrazzo floor and wall tile, rubber tile, compressed asphalt tile and linoleum floors, iron work, steel sash, steel stairs, steel shelving, cabinets and partitions, metal and built-up roofing, roof ventilators, skylights, lightning conductors, metal lathing, plastering, sound deadening, carpentry, metal weatherstrips, insect screens, linen chute, platform scales, painting, glazing, hardware, plumbing, refrigerating, heating and ventilating, electrical work, electric elevators, and outside distribution systems, and such other items as shown or specified. Separate bids will be received for (a) General Construction; (b) Plumbing, Heating, and Electrical Work; (c) Electric Elevators; and (d) Refrigerating Plant; all as set forth on bid form.

* * * * *

Bids must be submitted upon the Standard Government Form of Bid and the successful bidder will be required to execute the Standard Government Form of Contract for Construction.

Time of performance will be an essence of the contract and bids will be evaluated on the basis of time. In evaluating bids there will be added to each bid other than the one offering to complete in the shortest time an amount equal to the daily liquidated damages named in the Invitation for Bids, multiplied by the number of calendar days that such bidders have named for performance of the work in excess of the days named by the bidder proposing to do the work in the shortest time.

28 The invitation for bids, as well as paragraph 37 of the specifications and art. 9 of the standard contract form, provided that liquidated damages for delay by failure of the contractor to complete the work included in his bid within the time specified would be at the rate of $130 a day for "general construction"; $70 a day for "plumbing, heating, and electrical work"; $10 a day for "electric elevators"; and $10 a day for "a refrigerating plant."

As a part of the invitation for bids the Government, in writing, advised all prospective bidders that it was the general intention that the contractor for general construction would, unless otherwise specified, completely prepare the site for building operations and furnish all labor and materials required to construct and

finish complete as shown on the drawings, as described by the specifications, and as noted in his bid, upon which an award might be made, the one hospital building, and roads, walks, grading, and drainage, etc., and that the mechanical equipment covered by contracts made upon awards therefor under separate bids would be installed in the building as its construction progressed, as called for in the construction contract and specifications. Par. 7 of the specifications and art. 13 of the contracts provided that each contractor should fully cooperate with other contractors and carefully fit his own work to that provided under other contracts as might be directed by the contracting officer, and that no contractor should commit or permit any act which would interfere with the performance of work by any other contractor.

The bidder for general construction work of erecting the hospital building was required by the invitation for bids and the specifications to state the time within which such work would be completed, and time of performance was to be an essence of the contract between the Government and the contractor for general construction; the specifications relating to plumbing, heating, electrical work, and other mechanical work, provided that the general conditions set forth therein would govern where applicable all work in connection with plumbing, heating, and other mechanical work, and further provided as follows:

29 "Time for completion: All work under this section [plumbing, heating, etc.] of the specification shall be completed at at a date not later than that provided for in the contract for General Construction (see construction section of specification and bid forms for the completion of work under that contract). Failure to comply with the above will result in the deduction of liquidated damages from contract payments as hereinbefore provided under "General Conditions."

2. Chas. Smith & Sons, Inc., of Hartford, Conn., was the successful bidder for the work of constructing and finishing complete the hospital building, together with all roads, walks, grading, and drainage in connection therewith. On April 21, 1932, this company and the Government through L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, entered into the standard form of contract for this work for a total consideration of $374,000, and art. 1 of this contract provided that "The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after date of receipt of notice to proceed."

On or shortly before April 19, 1932, the date specified in the invitation for bids issued March 12, 1932, the D. C. Engineering

Co., Inc., hereinafter referred to as plaintiff, submitted its bid for plumbing, heating, and electrical work called for by the specifications and drawings to be installed in the hospital building to be constructed by defendant under a separate contract, and stated that it would complete the same within the period fixed by the Government in its contract for general construction for a price of $89,500, in accordance with specifications, schedules, and drawings prepared and furnished by the Government. The printed Government bid form stated "The above bid is made with the understanding that all work covered thereby will be completed at a date not later than that provided in the contract for General Construction." Plaintiff's bid was accepted by the Government and, on April 29, 1932, the plaintiff and the United States, represented by L. H. Tripp, Director of Construction, Veterans' Administration, as contracting officer, executed the standard form of contract, which, with the exception of description of the work to be performed thereunder, was, in all respects, identical with the contract between the Government and the contractor for the work of constructing the building.

3. May 9, 1932, the Government, through its contracting officer gave Chas. Smith & Sons, Inc., the contractor for general construction, notice to proceed, and on May 12 gave plaintiff written notice to proceed as follows:

You are hereby notified to proceed with the installation of Plumbing, Heating, and Electrical Work at Veterans' Administration Hospital, Togus, Maine, as contemplated by Contract VAc-196, dated April 29, 1932, your copy of which is attached. The performance bond signed by you and the Globe Indemnity Company, 150 William Street, New York City, N. Y., in support of this contract, has been approved and is on file with the Service record of this agreement.

It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1932.

Under these notices to proceed, the work of constructing the building and the work of furnishing and installing therein the plumbing, heating, and electrical equipment were due for completion January 14, 1933. The progress of plaintiff's work under its contract was dependent upon progress of the general construction work being performed by the Government under a separate contract.

4. At the time of preparing its bid, plaintiff, being aware of the importance to it of the period for performance under its contract if it was the successful bidder, conferred with the Director

of Construction of the Veterans' Administration, who was the Government's contracting officer, to determine when the work of constructing the hospital building would commence and the period of the year during which it would be prosecuted. The contracting officer advised plaintiff that construction work would commence in early spring of 1932 as soon as weather conditions would permit so that the building would be under roof and enclosed before cold weather set in during the following months. Plaintiff made its bid in reliance upon that advice and upon the basis of the provisions of the standard form of contract and the specifi-
31 cations. Plaintiff was ready to proceed and perform the work called for by its contract at all times on and after the date on which it received notice to proceed.

Plaintiff's contract provided in art. 1 that "The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for general construction." Art. 3 of plaintiff's contract and, also, of the contract between defendant and Chas. Smith & Sons, Inc., for general construction provided that the contracting officer might at any time by written order make changes in the drawings and specifications of the contract, or in either, and within the general scope thereof, and that if such changes caused an increase or decrease in the amount due under the contract, or in the time required for its performance, an "equitable adjustment shall be made and the contract shall be modified in writing accordingly"; that any claim for adjustment must be asserted within ten days from the date the change is ordered, unless the contracting officer should extend the time, and that if the parties could not agree upon the adjustment the dispute should be determined as provided in art. 15 of the contract; but that nothing in that article should excuse the contractor from proceeding with prosecution of the work so changed.

Art. 4 of both contracts provided that should the Government discover, during progress of the work, subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting officer should promptly investigate the conditions and if he found that they materially differed from those shown on the drawings or indicated in the specifications he should at once make such changes in the drawings and specifications as he might find necessary, "and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

Art. 15 provided that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer or his authorized representative, subject to appeal by the

contractor within thirty days to the head of the depart-
32 ment, whose decision should be final and conclusive upon the parties thereto as to such questions of fact, and that, in the meantime, the contractor should diligently proceed with the work as directed.

The defendant's specifications relating to excavation and foundation work in connection with construction of the building within which plaintiff was to install the mechanical equipment called for by its contract, and which specifications were furnished to plaintiff when bids were called for, provided (1 C–1, par. 2) that the contractor for general construction would clear the site of the building "and do all necessary excavating to the dimensions and levels shown on drawings for basements, areas, foundations, footings, walls, floors, and all work shown"; that should rock, within the definition of the specifications, be encountered within the limits of the required excavations payment for removal thereof would be made subject to such adjustment as provided by articles 3 and 4 of the contract; that only solid ledge rock or rock that could not be removed with pick or wedge, or boulders exceeding 12 cubic feet in bulk, should be considered as rock; that the bottom of all excavations for foundations should be properly leveled off and footings placed on undisturbed soil; that excavations should not be carried lower than required for footings, foundations, etc., as shown on the drawings; that work of excavating to the dimensions as shown on the drawings as required by the nature of the soil, or for additional construction, would be paid for as an extra in accordance with the contract. This specification further provided as follows:

Excavate to ledge for all piers, columns, footings, foundations, etc. The approximate location of ledge is shown on drawings. All supporting members, piers, walls, etc., must rest on solid rock ledge. The location of ledge shown on drawings is approximate, but as accurate as possible from available data. This contractor will remove all materials to ledge where required for all walls, piers, etc., under this contract but any ledge necessary to remove will be adjusted according to the contract. All bearing masonry shall rest on level beds on ledge. No sloping or rough rock beds will be permitted.

33 5. The defendant through its contractor for general construction started construction work immediately after May 9, 1932, and some time prior to June 4, 1932, plaintiff received notice from defendant's general contractor that sufficient progress on the general construction work would be made by June 6, 1932, to enable plaintiff to commence and thereafter prosecute its work. Upon receipt of this notice plaintiff proceeded to employ its superintendent and prior to June 4 it shipped to the site of the work

$2,500 worth of tools and equipment and several carloads of plumbing, heating, and electrical material to be installed in the building under its contract. On June 6 plaintiff's president and its superintendent arrived at the site of the work to begin operations, and, upon arrival, plaintiff found that 80 percent of the work of excavating for foundations of building had been done, but that, on that date, all work by the general contractor had been stopped by the defendant due to the encountering of subsurface conditions materially differing from those shown on the drawings and set forth in the specifications. The defendant, through its contractor for general construction had commenced excavation work May 11, but before June 6 changed conditions were encountered and the defendant discovered that the foundations for the building could not be constructed as shown on the drawings and as set forth in the specifications because of the fact that, over a large portion of the foundation area, instead of finding proper foundation bearings, as shown on the drawings and as stated in the specifications, soft sand, and a great deal of water and quicksand were encountered. Thereupon the contracting officer ordered all construction work stopped pending decision as to what should be done. All general construction work in connection with foundations for the building remained under suspension by order of the contracting officer from about June 4 until August 9, 1932. In the meantime, the defendant at its own expense carried on exploration work in connection with which numerous test pits were dug to much greater depths and dimensions than originally called for and numerous bearing tests were made therein for the purpose of ascertaining whether adequate foundation support could be secured on the original
34 site and for the purpose of securing the information necessary for preparation of new drawings to meet and overcome the conditions encountered in connection with the foundations of the building. A number of conferences were held and it was finally decided that because of the subsurface conditions, which had not been anticipated by anyone, the building could not be constructed within the lines of the original site and that its location would have to be changed so as to avoid the conditions encountered and prevent the large increase in costs of construction which would otherwise be necessary. Following the test excavations and the conferences, the contracting officer moved the location of practically the entire building. New plans and drawings were prepared and excavation for foundations of the building on the new location was commenced August 9, 1932.

Following the making of new plans and the relocation of the hospital building, the contracting officer issued certain written orders changing the contract for general construction and, under

articles 4 and 3 of that contract, made an equitable adjustment in the amount due under the contract due to the conditions encountered which resulted in a net increase of $103,489.49 in the contract price covering the general construction work. He also made an extension of time of 212 days to August 14, 1933, for completion of the building. The largest item in the equitable adjustments in price under the contract was $68,360.57 for costs, due to "extra work and delay," made necessary by the changed conditions encountered.

6. During the period from June 6 to August 6, 1932, while the general construction work was under suspension, plaintiff and the defendant's general contractor conferred with the contracting officer and other officials of the defendant. As a result of these conferences the contracting officer decided that work under the changed plans and at the new location should proceed forthwith regardless of approaching winter weather. At that conference plaintiff protested to the contracting officer that it should not be required to proceed with the work called for by its contract without extra compensation under conditions which would be encountered, different from conditions of performance as contemplated by its contract, and insisted that an equitable adjustment be made by the contracting officer under articles 4 and 3 of its contract increasing its contract price so as to meet the increased cost due to delay and the new conditions under which the work would have to be performed, i. e., during winter weather of 1932–1933 when the building would not be under cover and enclosed. But the contracting officer held and advised plaintiff that as no actual construction work had been performed by it under its contract up to that time no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor, and make claim in the United States Court of Claims for any excess costs incurred.

7. By October 8, 1932, the defendant through the contractor for general construction had completed the foundation footings and, on that date, directed its general contractor to commence pouring concrete for the building structure. On that date plaintiff for the first time was able to commence work under its contract. For a time thereafter the only work which plaintiff could perform was that of locating and placing pipe sleeves and outlets. The work of actually installing the plumbing and heating equipment followed later, when building construction had sufficiently progressed for that purpose. The hospital building under construction except for the delay from June 4 to October 8, 1932, for which plaintiff was in no wise responsible,

would have been under roof and generally enclosed before the beginning of cold and winter weather in 1932–1933. Seventy-five percent of the work to be performed by plaintiff under its contract was such as could be done along with the early general construction work as contemplated by the contract, before the building was under roof and generally enclosed. This work therefore could have been completed prior to winter weather had there been no delay in the work of constructing the building. The months of October and November 1932 were cold with some freezing weather, particularly in the latter month, and there was practically continuous freezing and subfreezing
36 weather during December 1932 and the months of January, February, March, and early April, 1933. The efficiency of plaintiff's mechanics and laborers engaged in plumbing and heating work was reduced 50 percent by reason of having to perform the work in freezing and near-freezing weather in the cold and winter months rather than in the summer and fall months as originally contemplated by plaintiff's contract, which would have been the case had the delay above-mentioned not occurred. The lowered efficiency of plaintiff's workmen, due to the changed conditions under which it was necessary to perform the work, resulted in additional labor costs to plaintiff of $5,192.49. The salary of plaintiff's superintendent on the job during the period of delay prior to October 8, 1932, of 126 days, was $1,170. During this period it was necessary for plaintiff to have his superintendent at the site of the work. During this delay period of 126 days plaintiff's actual overhead expense, exclusive of profit and the salary of its superintendent was $2,987.46. The total of extra costs mentioned is $9,349.95.

8. The general construction work on the hospital building and the plumbing, heating, and electrical work called for by plaintiff's contract to be installed therein were completed and accepted by the defendant October 1, 1933. This represented a delay of 48 days from August 14, 1933, the date to which the contracting officer had previously extended the original period of 250 days for completion, due to the changed conditions as hereinbefore mentioned. During this period of 48 days, plaintiff's expense for wages of its superintendent and foremen, in excess of the amount of such wages over a 250-day period, and for overhead was $3,073.08.

As to this delay in completion of the contract for general construction and plaintiff's contract, the defendant's contracting officer held upon substantial evidence before him that both the general contractor and the plaintiff had contributed thereto and found as a fact, among others, that delay of the general contractor was caused by plaintiff in the performance of the plumb-

ing, heating, and electrical work under its contract with the Government and that the delay of plaintiff was caused by the general construction work which was being performed by the
37 defendant under the general construction contract—thus constituting a delay due to unforeseeable causes beyond the control and without the fault or negligence of either contractor. In other words, the contracting officer found that each of the contractors had delayed the other during this 48-day period and he did not undertake to apportion the delay between them. His decision in this regard was not arbitrary or grossly erroneous. The contracting officer's final decision as to the delay to the contractor for general construction was made October 18, 1933, and his decision as to the delay to plaintiff was made on October 21, 1933.

9. As a result of the changed location of the hospital building, the contracting officer from time to time during performance of plaintiff's contract issued various orders for changes or extras under articles 3 and 5 of plaintiff's contract, the total of which resulted in a net reduction of $1,121.18 in plaintiff's contract price from $89,500 to $88,378.82. Certain minor defects which developed during the guarantee period under plaintiff's contract were corrected by the contracting officer at an expense of $559.64, further reducing plaintiff's original contract price to $87,819.18. Plaintiff was paid and has received from the defendant the last-mentioned amount of $87,819.18.

10. The actual cost to plaintiff of performing its contract, including overhead, plus profit at the rate of 8.5 percent on the original estimated cost of performing the plumbing, heating, and electrical work was $114,423.46, which is $26,044.64 in excess of the amended contract price of $88,378.82.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover $9,349.95.

It is therefore adjudged and ordered that plaintiff recover of and from the United States nine thousand three hundred forty-nine dollars and ninety-five cents ($9,349.95).

38 *Opinion*

LITTLETON, Judge, delivered the opinion of the court:

The D. C. Engineering Co., Inc., herein referred to as plaintiff, seeks to recover $26,044.64, representing its total excess cost of performance of work called for by its contract over the amended contract price of $88,378.82.

Plaintiff takes the position, in substance, that the whole of this excess cost resulted from and was attributable to an initial delay of 212 days and a subsequent additional delay of 48 days in defendant's general construction operations; that the 126 days' delay of the initial delay of 212 days was the result of failure of the defendant to have the general construction work ready for plaintiff's work within a reasonable time after receipt by plaintiff of notice to proceed, and that the 48 hours' delay at the end of the contract, beyond the original fixed period of 250 days as extended to August 14, 1933, was likewise due to failure of defendant to have the construction work sufficiently advanced to enable plaintiff to complete its work that much earlier and at less cost. The building constructed by defendant under a separate contract was completed 260 days late. Plaintiff therefore contends that this delay of the defendant made it impossible for plaintiff to proceed properly and satisfactorily so as to complete its work in the period and under the circumstances contemplated by its contract; that the delay was unreasonable in that it required plaintiff to perform its work under unanticipated conditions and circumstances which rendered the work more expensive than it otherwise would have been had it been performed as contemplated by both parties to the contract, and that the defendant is liable for the total extra cost of performance.

Plaintiff relies chiefly upon the opinion of this court in H. M. McCloskey, Jr., Inc. to the Use of U. S. Fidelity and Guaranty Co. v. United States, 66 C. Cls. 105, but the principle there applied upon the facts disclosed by the record is not altogether applicable here. In that case the facts showed that the Government simply failed to fulfill within a reasonable time its contract obligation to prepare and furnish the McCloskey
39 Company the site upon which it was to perform the work called for by its contract. We do not find that case to be authority for allowance of the full amount of the loss claimed in this case. The amount, if any, recoverable in each case depends upon proof as to the nature and extent of and responsibility for the delay or conditions giving rise to excess performance costs, and the amount of such costs as are attributable to such delay or conditions under which it became necessary for the work to be performed.

Under the facts disclosed by the record in this case, the provisions of plaintiff's contract, the representations of the contracting officer as to the period during which the general construction work would be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of which plaintiff had a right to rely and did rely in making its bid, we are of opinion that plaintiff is entitled

to recover $9,349.95 of the total excess cost of $26,044.64 incurred. United States v. Smith, 94 U. S. 214, 217; Mueller v. United States, 113 U. S. 153, 156; Dermott v. Jones, 23 How. 220, 231, 233; O'Brien v. Miller, 168 U. S. 287, 297; Green County, Ky. v. Quinlan, 211 U. S. 582, 594; American Surety Co. v. Pauly (No. 1), 170 U. S. 133, 144; United States v. Spearin, 248 U. S. 132; Wood v. Fort Wayne, 119 U. S. 312, 321, 322; H. E. Crook Co., Inc., v. United States, (B–195), 59 C. Cls. 593.

Time was an essence of plaintiff's contract with the defendant and nowhere in plaintiff's contract or specifications or in defendant's contract and specifications for construction of the building in which plaintiff was to perform its work was the defendant relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible. Par. 1 of plaintiff's specifications 1H–1 specifically directed plaintiff's attention to the specifications and bid form for construction of the building in which the mechanical equipment was to be installed. While it is true that in the invitation for bids and the specifications for plumbing, heating, and electrical work it was stated by defendant that this work would be required to be commenced promptly after date of receipt of notice to proceed and be completed at a date not later than that fixed by the defendant in the contract which was to be made for construction of the hospital building, the representations made were definite enough to fix the rights and liabilities of plaintiff and defendant in the event of a material deviation or change in the represented conditions or the period of performance giving rise to an increase or decrease in cost of performance. The period in which construction of the building would be commenced and completed was definitely fixed by the defendant on April 21, 1932, and plaintiff's contract making that period of 250 days the period within which the plumbing, heating, and electrical work should be completed was executed April 29, 1932. On May 12, 1932, the defendant gave plaintiff written notice to proceed stating that it would be required to complete the work called for by its contract at a date not later than 250 calendar days after May 9, 1932, or by January 14, 1933. Before making its bid for furnishing and installing the plumbing, heating, and electrical equipment in the building to be constructed by defendant, plaintiff was advised by the contracting officer for the defendant, who had charge of all work connected with the entire project, that the work of constructing the building in which this equipment was to be installed would commence in the early spring of 1932 as soon as weather conditions permitted so that the building would be under roof and enclosed before cold weather set in during the following months. Nowhere in the invitation for bids, the specifications, or the standard form

of contract, upon all of which, together with the representation of the defendant's authorized contracting officer, the plaintiff made its bid, is there to be found any provision, express or implied, that the Government was not to be responsible for or liable to plaintiff for excess cost or damage resulting from and attributable to delay in the work to be performed by defendant of constructing the building. For this reason the cases of Wood et al. v. United States, 258 U. S. 120; H. E. Crook Co., Inc., v. United States, 270 U. S. 4; G & H Heating Co. v. United States, 63 C. Cls. 164; Gertner v. United States, 76 C. Cls. 643, all of which involved
41 visions, are not in point here. See Cotton et al. v. United States, 33 C. Cls. 536, 548; Hyde v. United States, 38 C. Cls. 649; Miller v. United States, 49 C. Cls. 276, 282, 283; Edge Moor-Iron Co. v. United States, 61 C. Cls. 392, 396; Carroll et al. v. United States, 76 C. Cls. 103.

Plaintiff's contract and specifications did not contain a provision that the price set forth in the contract should cover all expenses of every nature connected with the work to be done and that the Government was to be relieved of any liability if the building structure was not furnished as contemplated and stated, so that plaintiff could proceed with and perform its work during the time and under the conditions contemplated by both parties without incurring excess costs by reason of delay in construction operations. And we think it may not be said in this case that the parties to the contract here involved understood that the Government was to be relieved of all responsibility for any excess costs by reason of plaintiff having to perform the work called for by its contract under circumstances and conditions differing materially from those contemplated therein. Globe Refining Company v. Landa Cotton Oil Company, 190 U. S. 540, 543. The fact that a condition encountered, which causes delay, is unforeseen or unanticipated does not render the delay unavoidable and is not enough to relieve the contracting party, whose contractual duty it is to overcome it, from responsibility for damages to the other party from the delay caused by such condition. Carnegie Steel Co. v. United States, 49 C. Cls. 403, affirmed 240 U. S. 156. We are of opinion that plaintiff's contract and specifications as a whole, and particularly articles 4 and 13, when considered in connection with the Government's statements and representations set forth in the specifications relating to construction of the hospital building, require the conclusion that the Government was not relieved of responsibility for such of plaintiff's excess costs as did not result from a cause for which plaintiff was responsible and which plaintiff was not required, in making its bid, to take into consideration.

In the specifications and drawings supplied to all bidders, the Government showed and indicated the conditions under which

the work with which all parties were directly or indi-
42 rectly concerned would be performed. In these specifications and drawings and in art. 4 of the standard form of contract the Government, in effect, represented to all bidders, including plaintiff, that in making their bids they should not take into consideration costs or expense of performance by reason of delay or extra work which might result from discovery by the Government of subsurface or latent conditions at the site of the work materially differing from those shown on the drawings or indicated in the specifications; and that if such changed conditions should be encountered, the Government, through its contracting officer, would make an equitable adjustment in the amount due under the contract and in the time required for its performance so as to take care of any increase or decrease in the cost of performance resulting from such changed conditions. We think, in the circumstances, the fact that the Government encountered and discovered conditions materially differing from those contemplated and shown in its drawings and specifications in connection with its work of constructing the building in which plaintiff was to perform its work did not relieve the defendant of the duty, under plaintiff's contract, of making an equitable adjustment so as to increase the amount due under plaintiff's contract to take care of plaintiff's increased cost of performance resulting from and attributable to such changed conditions. Plaintiff had been notified prior to June 4, 1932, that the construction work would be ready for plaintiff to begin its work by that date. Plaintiff immediately shipped all its tools and several carloads of material to the site, and employed a superintendent and sent him to the job. The contracting officer ordered the construction work stopped for a period of sixty-five (65) days, and finally moved the location of the building. This delayed the construction of the foundations five months and twenty-four days. During this time plaintiff could do no work, although it had to keep its superintendent on the job and its overhead expense was accruing. Plaintiff timely protested to the contracting officer that it should not be required to proceed with the work called for by its contract at the price stated therein by reason of the delay
and under the circumstances and condition which had
43 arisen, and insisted that the contracting officer should make an equitable adjustment increasing the amount otherwise due under its contract so as to meet the new and changed conditions which had been and would be encountered in its performance. The contracting officer, while not denying the claimed effect upon plaintiff's performance, refused to make any adjustment and, in so refusing, we think he failed to perform the duty required of him under art. 4 of the contract. It should be noted here that

the contracting officer did make an adjustment in plaintiff's contract in favor of the Government of a net decrease of $1,121 in the amount due under plaintiff's contract by reason of the elimination of certain work because of the changed conditions encountered which necessitated the relocation of the building. It seems obvious that the adjustment, in order to be equitable as contemplated in the contract, should have taken into consideration as well the then known and clearly contemplated increased performance costs of plaintiff by reason of the same conditions. The changed conditions affected plaintiff's performance and costs in much the same way as they affected the performance and costs of the defendant's construction contractor, but in a lesser degree. Nevertheless, the plaintiff got nothing for its increased costs and the construction contractor was given an increase of $68,360.57 as an equitable adjustment "for extra work and delay" due to the changed conditions encountered.

In these circumstances and for the reasons hereinbefore stated, it becomes the duty of the court to determine and allow plaintiff the amount which will compensate it for the excess costs incurred and paid by it by reason of delay in performance of the work under conditions which rendered it more expensive than it otherwise would have been. We have found from the evidence submitted that this excess cost is $9,349.95, made up of superintendent's salary and agreed overhead expense from June 4, 1932, the date on which plaintiff had been notified it could begin its work, to October 8, 1932, the date on which the building construction work was first ready for commencement by plaintiff of its work, and increased labor costs resulting from inefficiency of laborers who had to perform their work in the open, during the cold and
44 winter weather of 1932–1933, rather than in an enclosed building as originally contemplated by the parties to the contract.

With reference to the further excess costs amounting to $3,073.08, representing wages of the superintendent and foremen, and overhead expense for the delay period of 48 days after the extended date of August 14, 1933, for completion, the evidence shows and the defendant's contracting officer found that plaintiff was as much responsible for this delay as was the defendant's contractor for the general construction and, therefore, extended the time for each of the contractors from August 14 to October 1, 1933. Plaintiff is therefore not entitled to recover this cost.

The balance of $13,621.61 of the total loss of $26,044.64 sustained by plaintiff under its contract appears from the evidence of record to have been the result of inadequate estimates by plaintiff for costs of direct labor and materials for heating and plumbing and its inability, due to its financial condition, to take advantage

of certain discounts for prompt payments on materials purchased and installed in the building. We need not determine whether under all the circumstances the plaintiff would be entitled to recover on account of loss of discounts for the reason that the proof does not show the exact amount which plaintiff was required to pay for materials, by reason of its inability to take advantage of allowable discounts through prompt payments for materials purchased. In these circumstances, this portion of the total excess cost of $26,044.64 is clearly not recoverable.

Judgment will be entered in favor of plaintiff for $9,349.95. It is so ordered.

Concurring opinion

GREEN, Judge, concurring:

I concur in the opinion of Judge Littleton but wish to add some observations on the case.

The defense of the defendant as set forth in its brief seems to be based largely upon the fact that the construction of the building itself was let by the defendant to another contractor and that the defendant consequently was not responsible for any delays
45 in its erection. I think the opinion of Judge Littleton shows very clearly that this is no defense under the circumstances of the case and that the authorities cited by defendant's counsel are not applicable to the situation which we have before us. I would, however, go farther than this.

As the stoppage of the work was caused by the orders of the defendant's authorized agent, the construction officer, the defendant was directly responsible for the stoppage and the consequences which followed from it. Plaintiff's contract with defendent fixed a time for the completion of the building and the work of plaintiff. After the contract had been entered into, the defendant, through its construction officer, by written notice, called plaintiff's[1] attention to this requirement. The time for completion was one of the specifications of the contract and there is always an implied warranty that the specifications are adequate for the work to be done. See United States v. Spearin, 248 U. S. 132, 136, where this rule is laid down. When the defendant ordered the work stopped, and continued its stoppage for the period stated in Judge Littleton's opinion, it obviously changed the contract and by this breach became liable for the damage caused to plaintiff by this act. But if the defendant be not held directly liable, it is clearly liable under Articles 3 and 4.

It makes no difference, however, in the amount of plaintiff's recovery whether the defendant be held liable directly for the

[1] The word "plaintiff" is used in this opinion as referring to either plaintiffs' predecessor or the nominal plaintiffs in the case.

stoppage, or be held liable under Articles 3 and 4 of the contract.

Plaintiff's contract provided in substance in Article 3 that the contracting officer might make changes in the drawings and specifications of the contract within the general scope thereof, and also provided in substance in Article 4 that if the Government discovered in the progress of the work subsurface conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the contracting officer could
46 make such changes in the drawings and specifications as he might find necessary. But if it should be held that these provisions authorized the change in the contract which the contracting officer made, they do not relieve the defendant of responsibility, for the same articles also provided in substance that in the event the contracting officer should make a change in accordance therewith which increased the cost of the work or the time of its performance, that an equitable adjustment should be made with the contractor. The contracting officer did make an equitable adjustment with the building construction contractor increasing the price for building construction work in the amount of $68,360.50 for extra work and delay, but refused to make any adjustment with the plaintiff for increased costs notwithstanding plaintiff's objections and protests against his action and stated in substance that no adjustment could be made under the contract as no actual construction work had been performed by the plaintiff at the time the change was made. This decision was erroneous. If either Articles 3 or 4 are applicable under the facts in the case, the refusal of the contracting officer to make an adjustment was a violation of the contract and made the defendant liable to plaintiff for the injury or damage done by the change made. The measure of plaintiff's recovery would then be the same as it would be if plaintiff was held directly liable for the stoppage of the work.

It has been urged as a defense to plaintiff's action that the change made was not the fault of anyone but simply resulted from unforeseen conditions. I am of the opinion that the fact that the change made was necessary and that the cause thereof was unforeseen is no defense even if it should be held that it was not the fault of anyone that the defects in the site were not discovered earlier. See United States v. Thomas, 15 Wall. 337, 339, 348.

In my view, the defendant breached the contract in changing it to the injury and damage of plaintiff at a time when plaintiff was ready to perform it and would, if permitted, have completed it in accordance with the terms to which the parties had agreed. This is sufficient to entitle the plaintiff to recover.

47 *Concurring opinion*

WHALEY, Chief Justice: I concur in the part of this opinion which holds that plaintiff is entitled to actual damages resulting from the stoppage of work by order of the defendant. I do not believe Articles 3 and 4 have any application.

JONES, Judge, concurs in this statement.

Dissenting opinion

MADDEN, Judge, dissenting:

I do not agree with the opinion of the Court. In my discussion I shall use the word "plaintiff" to refer either to the receivers who are here suing as such, or to the contractor who made the contract and did the work. The context will show which is meant.

Plaintiff's theory of recovery is stated in their reply brief as follows:

* * * Plaintiffs' claim is predicated upon a delay of 212 days caused by the Government, resulting primarily from the discovery of faulty foundations which necessitated the drawing of new plans and complete relocation of the Hospital building.

There is no claim that anyone was at fault in failing to discover sooner the faulty foundations, but it is plaintiffs' position that the delay resulting therefrom, which made the cost of performance greater than had been expected, was a breach of contract on the part of the defendant, entitling plaintiffs to recover the additional cost. Ordinarily, the fact that the performance of one of the parties to a contract is made more difficult or expensive by supervening circumstances does not excuse him from performing. See 6 Williston, Contracts, sec. 1963, p. 5504; Maryland Dredging Co. v. United States, 47 C. Cls. 557. Nor does it entitle him to additional compensation. Day v. United States, 245 U. S. 159.

Plaintiffs' claim then depends upon whether there is anything in the contract here involved to take it out of the general rule. The question should be, not as the majority opinion states, whether under the terms of the contract "the defendant was relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way
48 responsible," but whether under the terms of the contract, the defendant should be held to have assumed responsibility to compensate plaintiff for excess costs due to delay which was no one's fault.

The defendant did not agree to have the building ready for the contractor who was to install the plumbing, heating, and

wiring at any fixed time, and from the specifications and contract, plaintiff must have known that its time of performance was dependent upon the progress of the building contractor. The specifications clearly directed its attention to the contract for general construction and advised it that its contract was to be performed in harmony with the other work on the building. Article 1 of the contract provided that the work under it was to be completed "at a date not later than that provided for in the contract for General Construction," but there was no promise on the part of the defendant as to when that date would be. Plaintiff must have known that the government reserved the power to make changes in the builder's contract, as well as in its own, and that exercise of that power would necessarily cause delay. Cf. H. E. Crook Co. v. United States, 270 U. S. 4; Gertner, Sr., v. United States, 76 C. Cls. 643.

Article 4 of the contract provided that if the government should discover, or the contractor encounter, unexpected conditions at the site materially differing from those shown in the drawings and specifications, the contracting officer should make the necessary changes in the plans and any necessary changes in the amount of compensation and time for performance. This provision seems to me to have reference only to the contractor whose work is directly affected by the discovery of the unexpected condition. Nor does plaintiff appear to have understood the provision in any other sense, for no reliance is placed on article 4 in its briefs. If plaintiff had made its contract under such circumstances that it and the agents of the government expected that the work would be done in the winter, plaintiff and other bidders would have estimated for a high labor cost. If, then, the building contractor had been delayed due to unforeseen conditions, so that plaintiff's work was done in the summer, it would have profited accordingly and the defendant could not, under the contract, have denied it that profit. I think
49 this risk of gain or loss is not removed by article 4, except as to the contractor who actually encounters the unforeseen condition.

The statement of the contracting officer to plaintiff that construction would begin in early spring so that the building would be under roof before cold weather set in appears to have been a truthful statement of a reasonable expectation at the time he spoke, but hardly a promise on the part of the government that what he said would be accomplished, regardless of intervening circumstances or events.

The provision in article 9 of the contract that the contractor's right to proceed to perform the contract and to be paid without

the deduction of liquidated damages for delay should not be prejudiced by delays due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor" seems to show that neither party was to be charged with breach of contract merely for delays due to such causes. Plaintiff was, as it should have been, granted an extension of time and excused from liquidated damages. That was all that it was entitled to under its contract.

51 *VI. Judgment of the court*

December 1, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover.

It is therefor adjudged and ordered that plaintiffs recover of and from the United States nine thousand three hundred forty-nine dollars and ninety-five cents ($9,349.95).

53 [Clerk's certificate to foregoing transcript omitted in printing.]

[Endorsement on cover:] File No. 46310. Court of Claims. Term No. 982. The United States, Petitioner vs. Fred J. Rice and W. Cameron Burton, Receivers for D. C. Engineering Company, Inc. Petition for a writ of certiorari and exhibit thereto. Filed February 27, 1942. Term No. 982 O. T. 1941.

U. S. GOVERNMENT PRINTING OFFICE 1932

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed April 13, 1942.

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 982 3/

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE UNITED STATES OF AMERICA, PETITIONER

v.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 982

THE UNITED STATES OF AMERICA, PETITIONER

v.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case on December 1, 1941.

OPINIONS BELOW

The opinions of the Court of Claims (R. 26–36) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1941 (R. 36). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the United States impliedly warrants that the time for completion specified in a standard form government construction contract is adequate for the performance of the contractor's work.

2. Whether Article 4 or any other provision of a standard form government construction contract obligates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of another contractor on account of unforeseen subsurface conditions.[1]

STATEMENT

This is a suit to recover from the United States damages due to delays in the performance of a Government contract for which the United States is alleged to be responsible. The facts, as found by the Court of Claims (R. 17–26), are as follows:

On April 29, 1932, the D. C. Engineering Company, Inc., of which respondents are the receivers, entered into a standard form construction contract with the United States, acting through the Director of Construction of the Veterans' Admin-

[1] If the petition for a writ of certiorari is granted, the United States will also urge that even if Article 4 applies, no recovery can be had here because there is no showing that an appeal from the contracting officer's rejection of the claim under Article 4 was made to the head of the department, as provided in Articles 4, 3, and 15, and because Article 4 does not obligate the United States in any case to make compensation for delays resulting from change orders.

istration, to supply and install the plumbing, heating equipment, and electrical work in the Veterans' Administration Home, to be constructed at Togus, Maine (R. 20). The Government's invitation to bid, dated March 12, 1932, indicated that the home was to be constructed under four separate contracts, (a) general construction, (b) plumbing, heating, and electrical work, (c) electric elevators, and (d) refrigerating plant; that the general contractor would prepare the site and construct the building; and that the mechanical equipment called for by the other contracts was to be installed, in accordance with the plans and specifications, as the building progressed (R. 17–19). All of the plans and specifications were included in one volume, and were to be included in each of the four contracts (R. 17). Bidders for the plumbing contract were notified that their work was to be completed at a date not later than that provided for the completion of the general construction contract (R. 19). Before submission of its bid, the respondents' company conferred with the Government's contracting officer to determine when the work of construction would commence; it was advised by him that construction would commence in the early spring of 1936, as soon as weather conditions would permit, so that the building would be under roof and enclosed before the cold weather (R. 20–21).

The respondents' contract contained the standard provisions permitting the Government to

issue change orders within the general scope of the contract and specifications (Art. 3; R. 8, 21); covering changes due to the discovery of subsurface and/or latent conditions materially differing from those shown on the drawings, or indicated in the specifications (Art. 4; R. 8, 21); and requiring the contractor to cooperate fully with the other contractors on the job, to fit his own work to that provided under the other contracts, and not to interfere in any way with their performance (Art. 13; R. 12, 19). The contract also provided that the work was to be commenced promptly after receipt of a notice to proceed and was to be completed not later than the date provided in the general construction contract (Art. 1; R. 7, 20). The specifications for plumbing required the plumbing work to be performed "in harmony with other work on the building" and "at such times as may be directed by the Superintendent of Construction, so as not to delay any other work on the buildings."

The Government's prior contract with the general contractor, signed April 21, 1932, provided that the work was to be completed within 250 calendar days after the date of receipt of the notice to proceed (R. 20). Notice to proceed was given by the Government to the general contractor on May 9, 1932, and to the respondents' company on May 12, 1932 (R. 20). Accordingly, the work was to be completed on January 14, 1933 (R. 20). Excavation work was commenced immediately after May 9, 1932, by the general contractor, and

sometime before June 6, 1932, it was discovered that instead of the solid foundation bearings indicated by the specifications, the site was underlain by soft soil, water, and quicksand. On June 6, 1932, the contracting officer ordered all construction work stopped pending decision as to what was to be done. After a number of soil tests had been made, it was decided to relocate the building, and new plans and drawings were prepared. Change orders under Articles 4 and 3 were issued, and an equitable adjustment, increasing the amount due to the general contractor by $103,489.49, was made; this amount included the sum of $63,360.57 for costs due to "extra work and delay" necessitated by the changed conditions encountered (R. 22–24).

The D. C. Engineering Company had been notified by the general contractor that sufficient progress on the foundations would be made to enable it to commence its work on June 6, 1932. Accordingly, the company employed its superintendent, and, prior to June 4, 1932, shipped its tools, equipment, and material to the site. On June 6, 1932, the company's president and superintendent arrived to begin operations, but on that day all work was stopped because of the subsurface conditions encountered (R. 22–23). During the period of suspension of work from June 6 to August 8, the respondents' company protested that it should not be required to proceed with its work in the wintertime unless an equitable adjustment in the amount due it were made under Articles 4 and 3

of the contract to compensate for increased costs due to the delay. The contracting officer refused to make such an equitable adjustment. There is no showing that respondents' company appealed this rejection of its claim to the head of the department under Articles 3 and 15 of the contract (R. 24).

Excavation on the new site was commenced by the general contractor on August 9, 1932, and the work had progressed far enough by October 8, 1932, to permit the D. C. Engineering Company to commence its work on that date. It was required to complete the work in the very cold winter months from October 1932 to April 1933. The efficiency of its employees was much reduced and additional labor costs of $5,192.49 were incurred. The salary of the superintendent during the period of delay, from June 6, 1932, to October 8, 1932, was $1,170. The company's overhead during this 126-day period amounted to $2,987.46 (R. 24–25).

Respondents brought suit to recover these sums, among others (R. 1–6, 16). The Court of Claims entered judgment for them for the total amount of these damages, $2,349.95 (R. 26). Other claims of respondents for damages for other delays were denied (R. 25–26) and are not here involved.

REASONS FOR GRANTING THE WRIT

The decision below announces a novel and far-reaching extension of Government liability under standard form contracts for delays in perform-

ance, long one of the most fruitful sources of litigation in the Court of Claims. The contrariety of views expressed in the four opinions delivered in the case emphasizes the desirability of obtaining an authoritative decision by this Court. The opinion of the court was delivered by Judge Littleton, but only one other judge concurred in the views therein expressed. This opinion proceeded primarily on the ground that the company was entitled to rely upon the specifications for the building construction and that the refusal of the contracting officer to make an "equitable adjustment" under Article 4 constituted a breach of contract (R. 26–32). Judge Green, while concurring in these views, went "farther than this" and held that the Government impliedly warranted that the time specified for completion was adequate and that the contracting officer's stop order therefore constituted a breach of contract (R. 32–33). Chief Justice Whaley and Judge Jones apparently concurred on this second ground alone and concluded that Article 4 was inapplicable (R. 34). The decision, as appears from Judge Madden's dissent, ignores settled principles and the provisions of the contract, and presents questions of substantial importance which should be settled by this Court.

1. The question whether the Government impliedly warrants the adequacy of the time for completion set forth in a standard form construction contract is one of manifest importance. The standard form contract normally includes a pro-

vision fixing the time for completion, together with a clause obligating the contractor to pay liquidated damages for delays unless due to "unforeseeable causes beyond the control and without the fault or negligence of the contractor." The decision below holds the Government accountable for all delays caused by any unforeseen condition beyond the control of either party, delays which are inevitable in normal times and which must occur with ever increasing frequency during the emergency due to the difficulty of scheduling the limited supplies available. The imposition of such liability without fault threatens the Government with incalculable losses under existing contracts. Past experience leaves no doubt that the decision below, if sustained, will provide the basis for numerous and substantial claims, not merely for future delays, but for those which occurred in the past within the six-year period of limitations and for which no demand for adjustment was ever made.

The decision on this aspect of the case is without support in principle, as Judge Madden's dissent makes clear, and is in conflict with the ruling of this Court in *Crook Co.* v. *United States*, 270 U. S. 4. In that case a contractor who had agreed to install, by the time the building was completed, a heating system in a repair shop being constructed for the Government, and who was delayed by the failure of the general contractors to keep to the planned schedule, was not permitted

to recover from the United States. The United States was held not to have bound itself to a fixed time for the completion of the work. Cf. *Detroit Steel Products Co. v. United States*, 62 C. Cls. 686, 695, certiorari denied, 275 U. S. 525.

The contrary conclusion reached by the court below in the present case disregards the whole structure of the standard form contract. Article 8 (g) of the Standard Specifications for General Conditions reserves to the Government the right "to suspend any portion of the contract work whenever the Administrator [of Veterans' Affairs] deems it necessary for the purpose or advantage of the work." Liability for delay resulting from such stoppages cannot, therefore, be based on breach of contract but must be derived from some express undertaking in the contract to make compensation. Yet the only ground of decision concurred in by a majority of the judges subjects the Government to liability without regard to Article 4, the only express provision which could be applicable.[2]

2. Article 4 of the standard form construction contract provides that if, during the course of the construction, it is discovered that the subsurface

[2] The case of *United States v. Spearin*, 248 U. S. 132, the only case cited by Judge Green for the view that the Government impliedly warranted the adequacy of the time for completion, involved physical specifications and does not even remotely suggest that there is an implied warranty as to time.

conditions at the site differ materially from those shown on the drawings or indicated in the specifications, the contracting officer shall, with the written approval of the head of the department or his representative, make such changes in the drawings and specifications as he may find necessary and shall make an equitable adjustment in the contract, under the provisions of Article 3, to reflect any increase or decrease of cost and any difference in time resulting from the changes (R. 8).[3] Two of the judges of the court below

[3]Articles 3 and 4 provide as follows:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the con-

held that the United States was liable to respondents because of these provisions of Article 4.

The question on this aspect of the case is whether damages may be recovered for a delay in the time for performance by one contractor resulting from the discovery of physical conditions at variance with the specifications for the work of another contractor. This question, while of narrower scope than the question discussed above, is nonetheless one of substantial importance. It has been common practice to let to several prime contractors separate parts of construction projects. A number of petitions for damages in situations similar to that in the present case are now pending in the Court of Claims and it may reasonably be assumed that others will be filed.[4]

The view of Judges Littleton and Green that the Government is accountable to respondents under

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tracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

[4] *Algernan Blair Co.* v. *United States*, No. 43548; *Wm. Eisenberg & Sons, Inc.* v. *United States*, No. 44772; *Hunter Steel Co.* v. *United States*, No. 43969; *Joseph A. Holpuch Company* v. *United States*, Nos. 43808, 43813; *M. H. Pagenhardt & Co.* v. *United States*, No. 45505.

Article 4 is, we believe, contrary to fundamental principles. In the absence of some provision to the contrary in the contract, the discovery of unforeseen conditions does not excuse performance by the contractor nor entitle him to additional compensation. *Day* v. *United States,* 245 U. S. 159; *Maryland Dredging Co.* v. *United States,* 47 C. Cls. 557; 6 Williston, *Contracts,* p. 5507. And while a contractor may rely upon the specifications for his own work, the adequacy of which the Government impliedly warrants (*United States* v. *Spearin,* 248 U. S. 132; *United States* v. *Atlantic Dredging Co.,* 253 U. S. 1), the undertaking of the Government should not, we submit, be construed as a warranty to all contractors of the adequacy of the separate specifications for the work of each of them. We do not think it can reasonably be said that the physical specifications for the work of the general contractor may be relied upon by those contracting to do other work which is dependent upon the progress of the general construction work only with respect to the time for performance. In this view, the risk that the work of the plumbing, heating, and electrical contractor may be delayed because the specifications for the work of the general construction contractor are inadequate stands on no different footing than the risk inherent in the possibility that strikes, floods or other similar factors may affect the time of completion of the general construction contract. Cf. *C. A. Hooper Co.* v. *United States,* 40 F. Supp.

491 (W. D. Wis.); *G. & H. Heating Co.* v. *United States*, 63 C. Cls. 164. That this was the understanding of respondents' company in the present case is evident from the fact that it placed no reliance on Article 4 in the court below.[5]

If there was no implied warranty to respondents' company of the adequacy of the specifications for the general construction work, it seems clear that there can be no recovery under Article 4. The purpose of including Article 4 in the standard form contract was quite obviously to prevent stoppages by a contractor for breach of an implied warranty as to specifications; the reach of the provision must be construed accordingly.

Even if Article 4 were applicable, however, no recovery should have been granted in this case because there is no showing that an appeal from the contracting officer's rejection of the company's claim under Article 4 was made to the head of the department, as provided in Articles 3, 4, and 15 (R. 24), and because, in any event, Article 4 does

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[5] The cases cited by Judge Littleton are not in point. Only three involve liability to one contractor for delay in the work of another and in all of them it was found that the Government had contracted to have conditions ready for the beginning of plaintiff's work. *Cotton* v. *United States*, 38 C. Cls. 536; *Miller* v. *United States*, 49 C. Cls. 278; *Edge Moor Iron Co.* v. *United States*, 61 C. Cls. 392. The Government undertook no such obligation here, as Judge Littleton apparently recognized. The only case we have found which supports Judge Littleton's view is the 4–3 decision of the New York Court of Appeals in *Cauldwell-Wingate Co.* v. *New York*, 276 N. Y. 365.

not obligate the United States to make compensation for increased costs due to mere delays resulting from change orders.

3. The present case climaxes a line of recent decisions by the Court of Claims gradually removing the heretofore established limitations on the Government's liability for delays. The Court of Claims had long held that a delay resulting from the issuance of a change order under Article 3 or predecessor clauses afforded no basis for a claim against the United States.* Following an intimation in *Karno-Smith Co.* v. *United States*, 84 C. Cls. 110, however, the court held that delays caused by change orders altering specifications pursuant to Article 4 constituted an actionable breach of contract for which recovery could be had even in the absence of compliance with the standard contract procedure, expressed in Article 3, for timely protest or administrative appeal. *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461; *Sobel* v. *United States*, 88 C. Cls. 149;

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* *McCord* v. *United States*, 9 C. Cls. 155, affirmed *sub nom. Chouteau* v. *United States*, 95 U. S. 61; *Swift & Co.* v. *United States*, 14 C. Cls. 208, 232–233; 14 C. Cls. 235; *Moran Bros. Co.* v. *United States*, 61 C. Cls. 73, 102; *Lange* v. *United States*, 61 C. Cls. 666, 682, certiorari denied, 273 U. S. 708; *Carroll* v. *United States*, 69 C. Cls. 435; *Fore River Shipb. Co.* v. *United States*, 62 C. Cls. 307, 317; *Newport News Shipb. & Dry Dock Co.* v. *United States*, 79 C. Cls. 1, 19–23; 79 C. Cls. 25, 34–35; 79 C. Cls. 37, 45; 79 C. Cls. 46, 53; *Leavering & Garrigues Co.* v. *United States*, 73 C. Cls. 508, 523; *Griffiths* v. *United States*, 74 C. Cls. 245; *Snare & Triest Co.* v. *United States*, 75 C. Cls. 326, 349–350.

Stapleton Construction Co., Inc. v. *United States*, 92 C. Cls. 551; *Herbert M. Baruch Corp., Inc., Ltd.* v. *United States*, 92 C. Cls. 571, 93 C. Cls. 107; *Hirsch* v. *United States*, No. 42997, decided November 3, 1941; but cf. *Nelson Construction Co.* v. *United States*, 91 C. Cls. 476; *Seeds & Derham* v. *United States*, 92 C. Cls. 97. In *Ross Engineering Co., Inc.* v. *United States*, 92 C. Cls. 253, the court held the Government liable for delaying beyond what it found to be a reasonable time in giving the contractor notice to proceed, notwithstanding the contractor's undertaking to commence work "as soon as practicable after receipt of notice to proceed" (p. 258). That decision, read with the holding in the present case that the Government warrants the adequacy of the time for completion after notice to proceed has been given, apparently removes all limitations on the Government's liability for delays without fault. Indeed, Judge Littleton's opinion expressly states that the Government is required to respond in damages unless, under the contract provisions and specifications, it is affirmatively "relieved of responsibility for or liability to plaintiff for excess costs by reason of delay for which plaintiff was in no way responsible."[1] Review by this Court, the only tribunal to

[1] Even where it is conceded that both parties are mutually responsible for delays, the court apparently places the burden upon the United States of negativing its responsibility for the entire delay. *H. W. Zweig Co.* v. *United States*, 92 C. Cls. 472.

which appeal may be had, is now required, we submit, if the Government's accountability is to be kept within proper limits.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

FEBRUARY
~~March~~ 1942.

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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1942

THE UNITED STATES OF AMERICA, PETITIONER

v.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (R. 26–36) are reported in 95 C. Cls. 84.

JURISDICTION

The judgment of the Court of Claims was entered December 1, 1941 (R. 36). The petition for a writ of certiorari was filed on February 27, 1942 (R. 36), and granted April 13, 1942. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether the United States impliedly warrants that no stoppage or delay will occur which will prevent performance of the contractor's work within the time for completion specified in a standard form government construction contract.

2. Whether Article 4 or any other provision of a standard form government construction contract obligates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of another contractor on account of unforeseen subsurface conditions.

3. Whether Article 4 of a standard form government contract obligates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of his contract.

4. Whether failure to appeal to the head of the department from a contracting officer's rejection of a claim under Article 4 bars a recovery under Articles 3, 4 and 15 of a standard form government construction contract.

STATEMENT

This is a suit to recover from the United States damages due to delays in the performance of a government contract for which the United States is alleged to be responsible. The facts, as found

by the Court of Claims (R. 17–26), are as follows:

On April 29, 1932, the D. C. Engineering Company, Inc., of which respondents are the receivers,[1] entered into a standard form construction contract with the United States, acting through the Director of Construction of the Veterans' Administration, to supply and install the plumbing, heating equipment, and electrical work in the Veterans' Administration Home, to be constructed at Togus, Maine (R. 20). The Government's invitation to bid, dated March 12, 1932, indicated that the home was to be constructed under four separate contracts: (a) general construction, (b) plumbing, heating, and electrical work, (c) electric elevators, and (d) refrigerating plant; that the general contractor would prepare the site and construct the building; and that the mechanical equipment called for by the other contracts was to be installed, in accordance with the plans and specifications, as the building progressed (R. 17–19). The specifications for the entire project were included in one volume (R. 17). Each standard form contract to be entered into between the Government and the successful bidder for the classification of work covered by his bid was to contain the detailed specifications applicable thereto (R. 17). The plans and draw-

[1] The Engineering Company is sometimes referred to hereinafter as "respondent."

ings for the entire work to be performed under all the contracts with the Government either accompanied the specifications or were made available to all bidders (R. 17). Bidders for the plumbing, heating, and electrical contract were notified that their work was to be completed at a date not later than that provided for the completion of the general construction contract and were referred to the provisions of that contract (R. 19). No separate completion date for the plumbing and electrical contract was fixed (R. 7). Before submission of its bid, respondent company conferred with the Government's contracting officer to determine when the work of construction would commence; it was advised by him that construction would commence in the early spring of 1932, as soon as weather conditions would permit, so that the building would be under roof and enclosed before the cold weather (R. 20–21).

The respondent's contract contained the standard provisions permitting the Government to issue change orders within the general scope of the contract and specifications (Art. 3; R. 8, 21); covering changes due to the discovery of subsurface and/or latent conditions materially differing from those shown on the drawings, or indicated in the specifications (Art. 4; R. 8, 21); excusing the contractor from liability for liquidated damages for delays due to unforeseeable causes beyond the contractor's control and without his negligence

(Art. 9; R. 10); and requiring the contractor to cooperate fully with the other contractors on the job, to fit his own work to that provided under the other contracts, and not to interfere in any way with their performance (Art. 13; R. 12, 19). The contract also provided that the work was to be commenced promptly after receipt of a notice to proceed and was to be completed not later than the date provided in the general construction contract (Art. 1; R. 7, 20).

The Government's contract with the general construction contractor, signed April 21, 1932, provided that the work was to be completed within 250 calendar days after the date of receipt of the notice to proceed (R. 19). Notice to proceed was given by the Government to the general construction contractor on May 9, 1932, and to the respondent on May 12, 1932 (R. 20). Accordingly, the work was originally scheduled for completion on January 14, 1933 (R. 20). Excavation work was commenced immediately after May 9, 1932, by the general construction contractor, and some time before June 6, 1932, it was discovered that instead of the solid foundation bearings indicated by the specifications, the site was underlain by soft soil, water and quicksand. This condition had not been anticipated by anyone (R. 23) and there is no finding that the Government had been negligent in failing to discover the nature of the subsurface soil in advance of construction. On June 6, 1932, the contracting officer ordered all con-

struction work stopped pending decision as to what was to be done. After a number of soil tests had been made, it was decided to relocate the building, and new plans and drawings were prepared. Change orders under Articles 4 and 3 of the general construction contractor's contract were issued, and an equitable adjustment, increasing the amount due to the general construction contractor by $103,489.49, was made; this amount included the sum of $68,360.57 for costs due to "extra work and delay" necessitated by the changed conditions encountered (R. 22–24).

The D. C. Engineering Company had been notified by the general contractor that sufficient progress on the foundations would be made to enable it to commence its work on June 6, 1932. Accordingly, the company employed its superintendent, and prior to June 4, 1932, shipped its tools, equipment, and material to the site. On June 6, 1932, the company's president and superintendent arrived to begin operations, but on that day all work was stopped because of the subsurface conditions encountered (R. 22–23). During the period of suspension of work from June 6 to August 8, the company protested that it should not be required to proceed with its work in the wintertime unless an adjustment in the amount due it were made under Articles 4 and 3 of the contract to compensate for increased costs due to the delay and the necessity of performing the work in winter weather. Except for changes, not

involved in this litigation, caused by the relocation of the building which slightly reduced respondent's contract price (R. 26), there was no suggestion that the specifications for the work to be performed by the company were changed. The contracting officer refused to make such an adjustment. There is no showing that the company appealed this rejection of its claim to the head of the department under Articles 4, 3 and 15 of the contract (R. 24).

Excavation on the new site was commenced by the general construction contractor on August 9, 1932, and the work had progressed far enough by October 8, 1932, to permit the D. C. Engineering Company to commence its work on that date. It was required to complete the work in the very cold winter months from October 1932 to April 1933. The efficiency of its employees was much reduced and additional labor costs of $5,192.49 were incurred. The salary of the superintendent during the period of delay, from June 6, 1932, to October 8, 1932, was $1,170. The company's overhead during this 126-day period amounted to $2,987.46 (R. 23–25).

Respondent brought suit to recover these sums, among others (R. 1–6, 16). The Court of Claims entered judgment for them for the total amount of these damages, $9,349.95 (R. 26), Judge Madden dissenting (R. 34). Other claims of respondents for damages for other delays were denied (R. 25–26) and are not here involved.

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The opinion of the court, delivered by Judge Littleton, and apparently concurred in only by Judge Green, appears to rest on the grounds that the Government is liable for all delays in the absence of an affirmative provision excusing it from responsibility (R. 27–29) and that Article 4 required the contractor to make an equitable adjustment for respondent's damages (R. 29–30). The opinion of Judge Green concurs in Judge Littleton's views, but also holds that the Government impliedly warranted the adequacy of the time specified for completion of respondent's work and that the issuance of a stop order extending the time required therefor changed the contract and rendered the Government liable for damages caused by the delay (R. 32–34). It was apparently on the latter ground that Chief Justice Whaley and Judge Jones concurred (R. 34). The latter expressly rejected Article 4 as a basis of their concurrence (R. 34). Judge Madden dissented (R. 34).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:[2]

(1) In holding that the respondent had a right to rely on representations contained in specifica-

[2] Three opinions were delivered by the judges who constituted the majority of the court below. It is not clear to what extent the grounds assigned by any one member of the court were joined in by the majority which concurred in the result. To avoid any question as to the adequacy of the assignments of error, however, the rulings of each of the majority are attributed to the court.

tions and drawings not relating to work to be performed under its contract.

(2) In holding that the respondent had a right to rely on the statements of the contracting officer relating to the period during which the general construction work would be performed.

(3) In holding that the Government warranted the adequacy of the time fixed for completion by the respondent.

(4) In holding that the Government was liable for delays in the work of respondent caused by interruption of the work of another contractor.

(5) In holding that the issuance of a stop order rendered the Government liable for the respondent's delay.

(6) In holding that the Government was liable for delay resulting from any cause for which the contractor was not responsible.

(7) In holding that the Government was liable for excess cost or damage resulting from delay unless the contract contained a provision, express or implied, relieving the Government of this responsibility.

(8) In failing to hold that the Government did not warrant to respondent the adequacy or accuracy of the subsurface conditions.

(9) In failing to hold that respondent may not recover under Article 4 for inaccuracy in specifications unrelated to respondent's work.

(10) In failing to hold that no recovery for delay may be had under Articles 3 or 4.

(11) In failing to hold that respondent cannot recover for failure to appeal the contracting officer's decision to the head of the department under Article 13.

(12) In giving judgment for respondent.

SUMMARY OF ARGUMENT

I

The contract bound the respondent-company to complete its work within a specified period, but nowhere contained any equivalent limitation upon the Government. In such circumstances it is settled that one who engages a contractor to construct a work within a given time does not warrant the adequacy of the time specified. On like principle, where several contractors are employed and the work of one is dependent on the progress of the work of another, the former receives no warranty that the latter will suffer no interruption from any cause. On the contrary, the risk of such interruption is a recognized contingency which the parties must be assumed to have considered in fixing the time for completion. *Crook Co.* v. *United States*, 270 U. S. 4.

II

1. Article 4 of the contract provides that in case of the discovery of unexpected subsurface conditions, adjustments shall be allowed for increases in cost or differences in time resulting from changes in specifications. This adjustment is in-

tended to be available only to the contractor whose specifications are changed. The warranty implied in the absence of Article 4 would have gone no further, and the article was not designed to expand the Government's liability but to prevent abandonment of the work by the contractor.

2. Numerous decisions have held that under Article 3, the reservation to the Government of the right to make changes indicates that the Government is not liable for damages from delay resulting from those changes. The same construction should be given to the similar language of Article 4.

3. Respondent cannot recover for the further reason that it did not appeal the adverse decision of the contracting officer to the head of the department, as required under the contract.

III

The issuance of the stop order of itself did not render the Government liable for delay. The stoppage of the work was authorized by the contract, and the agreement contains no provision authorizing compensation for delays caused by the exercise of such authority. Moreover, the stop order did not cause the delay but merely recognized the necessity of delay resulting from the discovery of unanticipated subsurface conditions. Since the Government is not liable to respondent for the delays caused by the unforeseen subsurface conditions, it cannot be held accountable for

issuing a stop order required by the discovery of such conditions.

ARGUMENT

I

THE GOVERNMENT GAVE RESPONDENT NO WARRANTY THAT THE GENERAL CONTRACTOR WOULD SUFFER NO DELAY FROM ANY CAUSE IN CONSTRUCTING THE FOUNDATION

The contract in the instant case contained the following provision fixing the completion date (R. 7):

> The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for General Construction.

The provisions in the contract for general construction thereby incorporated in the contract of respondent provided that (R. 19):

> The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after date of receipt of notice to proceed.

Article 9 of the contract with respondent (R. 10–11) dealt specifically with the subject of delay *by the contractor*. It provided that in case of such delay the Government may either terminate the contract or receive liquidated damages for each calendar day of delayed performance, and then

contained the significant proviso that the contractor shall not be

> charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes * * *.

1. There can be no question that if a single contract had been let in these terms for the construction of the entire project, the Government would not have been held to have warranted the adequacy of the time specified for completion, or that no difficulties causing delay would be encountered. All of these contract provisions together disclose that the obligation of timely completion was imposed solely on the contractor. No parallel or equivalent obligations were laid upon the Government. Indeed, the work was to be commenced only when the Government gave the word (R. 7), and the Government reserved the right to make changes which would inevitably change the time for completion (R. 8). It is apparent from the contract and offer together that time was considered essential only as to the contractor's agreement to build and not as to any promise by the

Government. Cf. *Werner* v. *Zintsmaster*, 61 F. (2d) 298 (C. C. A. 3).

There was thus neither an express promise nor any basis for implying a warranty by the Government as to the time within which performance could be completed. Indeed, it is settled that in the absence of an express agreement, the contractor is liable for breach of contract as a result of delay caused by unanticipated difficulties. *Maryland Dredging Co.* v. *United States*, 241 U. S. 184; Restatement of Contracts, § 467; 6 Williston, *Contracts* (rev. ed., 1938) § 1964. Obviously, if the contractor is liable to the owner for such delays, the owner is not liable to the contractor, and cannot be regarded as having warranted to the contractor that such delays will not ensue. Cf. *Day* v. *United States*, 245 U. S. 159; *Navarro Corp.* v. *School District*, 25 Atl. (2d) 808 (Pa. 1942). Judge Littleton's opinion assumes that in the absence of a specific provision relieving the Government of liability, the Government is responsible for damages from delay, even though not attributable to the Government's fault. But the law is to the contrary; unless liability is imposed by an express provision of the contract, the Government is not liable.

Furthermore, the contract provided in Article 9 that, despite its strict clauses as to liquidated damages for delay by the contractor, he would not be liable for delay due to unforeseeable causes

beyond his control. The theory of the court in this case would subject the Government to damages for delay from unforeseeable causes. If the contractor who was obliged to complete the work within a specified time was not to be held liable for such delay, it surely is unreasonable to impose a more stringent liability upon the Government, which had made no commitments at all on the subject. The only plausible reason for the absence of a similar clause protecting the Government is that no such clause was thought to be necessary for the Government's protection. As this Court said in *Crook Co.* v. *United States,* 270 U. S. 4, 6:

> The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable

> from the point of view of both parties to the contract in the suit. * * * We are of the opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out * * *.

2. An additional obstacle to the implication of a warranty by the Government of no delays exists where the work is divided among several contractors and the performance of the claimant is made dependent on that of other contractors. In this case, the work of the general construction contractor was to be completed within 250 days from the date of receipt of notice to proceed (R. 19), and respondent was to finish at a date not later than that fixed in the general construction contract (R. 20) and to fit its work to that of the other contractors (R. 12, 20). The Government, however, did not guarantee to the general contractor that he would be able to finish on that date, much less that his excavating or other work could proceed at a given rate without interruption. And there is no reason to believe that the Government intended to give the respondent an undertaking as to the progress of the general contractor's work which it did not give to such contractor directly. Furthermore, the Government had the right to require changes in the general contractor's plans which would have resulted in delaying the completion of his work, or, by agree-

ment with him, to have extended his time to perform. In either of such circumstances, respondent's time to perform would correspondingly have been extended and respondent would have had no cause for complaint. This is a strong indication that the Government was not guaranteeing respondent that the general contractor would complete his work at the time originally specified.

The decision of this Court in *Crook Co.* v. *United States*, 270 U. S. 4, would seem conclusive on this issue also.[3] In that case, the plaintiff contracted to install heating systems in two structures which were being constructed by other contractors. The plaintiff was required to complete on a fixed date and was given the approximate dates of completion of the two structures. The other contractors were delayed for almost a year, and plaintiff sued the Government for resulting dam-

[3] Prior to the decision in the *Crook* case, the Court of Claims had held the Government liable for the contractor's delay. *Cotton* v. *United States*, 38 C. Cls. 536; *Miller* v. *United States*, 49 C. Cls. 276; *Edge Moor Iron Co.* v. *United States*, 61 C. Cls. 392. These cases, cited with approval by Judge Littleton (R. 28, 29), can no longer be regarded as authoritative. It is of interest to observe that the opinion of the Court of Claims in the *Crook* case (*H. E. Crook Co., Inc.* v. *United States*, 59 C. Cls. 593) which assumes that the delay constituted a breach of contract for which recovery could have been had in the absence of a waiver (59 C. Cls. at 597), is cited with approval by Judge Littleton in the instant case (R. 28). Judge Littleton apparently failed to note that the remarks upon which he relied were inconsistent with this Court's opinion in the same case.

ages incurred by reason of the delay. With respect to the contingent character of the completion date, the Court observed (*Id.* pp. 5–6):

> The contract was that the plaintiff should furnish and install heating systems "one in the Foundry Building, and one in the Machine Shop at the Navy Yard, Norfolk, Virginia. It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed. A copy was delivered on August 31, 1917, making March 19, 1918, the day for completion. But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Brothers Co.* v. *United States,* 254 U. S. 83, 86. The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time. "The approximate contract date of completion for the foundry" is stated to be March 17, 1918, and that for the machine shop, February 15, 1918. The same dates were fixed for completing the heating systems, but the heating apparatus had to conform to the structure, of course, so that if the general contractors were behindhand the heating also would be delayed. They were behindhand nearly a year. When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in

> the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.'

See also *C. A. Hooper Co.* v. *United States*, 40 F. Supp. 491 (W. D. Wis.). The portion of the opinion quoted above also refers to the Government's reservation of the right to make changes and to interrupt the continuity of the work as showing that the completion date was only provisional. Similar provisions were contained in the contract involved here (R. 8).[5]

3. The opinion of Judge Littleton relies to some extent upon the fact that the Government's con-

[4] The opinion in the *Crook* case also refers to a clause in the contract which provides that the contract price shall cover all expenses of whatever nature or description connected with the work to be done under the contract. A comparable provision does not appear in the contract involved here. However, there is nothing in the *Crook* case opinion to indicate that the conclusions quoted above are dependent upon that clause. Furthermore, it is clear from the express terms of the clause itself that it had application only to expenses incurred in work performed "under" the contract. See Record in *H. E. Crook Co. Inc.* v. *United States*, No. 122, October Term, 1925, p. 23. Therefore, that clause could have no effect on the recovery of damages for breach of contract or on the existence of a breach.

[5] The decisions of the state courts are divided on the question of an owner's liability to a contractor for delays caused by another contractor. Those holding for such liability proceed upon the theory of an implied obligation upon the part of the owner to maintain the construction work in such a state of forwardness as to enable the contractor to complete its contract within the time fixed. *Stehlin-Miller-Henes Co.* v. *City of Bridgeport*, 97 Conn. 657, 117 Atl. 811; *W. H. Stubbings Co.* v. *World's Col. Ex. Co.*, 110 Ill. App.

tracting officer made "representations" as to the period of the year during which the general construction work would be performed (R. 27, 28, 29). The court's finding of fact on this point is that the contracting officer advised respondent that the construction work would commence in the early spring of 1932, so that the building would be enclosed before cold weather set in (R. 20–22). These statements, however, cannot be regarded as warranties of the uninterrupted continuity of the work. As Judge Madden indicated in his dissenting opinion:

> The statement of the contracting officer * * * appears to have been a truthful statement of a reasonable expectation at the time he spoke, but hardly a promise on the part of the government that what he said would be accomplished, regardless of intervening circumstances or events. (R. 35.)

210; *Byrne* v. *Bellingham Consol. School Dist. No. 301*, 7 Wash. (2d) 20, 108 P. (2d) 791. Those denying liability hold that the owner does not guarantee against delays but merely undertakes to go forward with the work and that the risk of delays from other contractors is one of the contingencies assumed by the contractor. *Goss* v. *Northern Pac. Hospital Ass'n of Tacoma*, 50 Wash. 236, 96 Pac. 1078; *Henry Shenk Co.* v. *Erie County*, 319 Pa. 100, 178 Atl. 662; *Corporation of President, Etc.* v. *Hartford Acc. Etc. Co.*, 98 Utah 297, 95 P. (2d) 736; cf. *Edward E. Gillen Co* .. *John H. Parker Co.*, 170 Wis. 264, 171 N. W. 61. The results of the decisions have sometimes been held to turn upon particular contract provisions. Cf. *Goss* v. *Northern Pac. Hospitol Ass'n of Tacoma*, *supra*, with *Byrne* v. *Bellingham Consol. School Dist. No. 301*, *supra*.

Even if the contracting officer intended his representation to be more than a statement of his reasonable expectation, it can have no operative effect in defining the Government's obligation. Provisions as to time of performance and the conditions of performance are set forth in the written contract. They clearly purport to embody the complete understanding of the parties with respect to these matters and contain no undertaking that the work would be done at any period of the year. Reliance on the oral statements of the Government contracting officer would therefore seem precluded by the parol evidence rule. *Simpson* v. *United States*, 172 U. S. 372; 3 Williston, *Contracts* (rev. ed. 1938) §§ 639, 640. There is special reason for excluding such oral representations from consideration in the case of Government contracts, since the public policy embodied in the competitive bidding statutes would be defeated unless all bidders were required to rely solely on the uniform written invitation to bid. Cf. *Mueller* v. *United States*, 19 C. Cls. 581.

Moreover, the contracting officer represented at most the date on which the general work would begin, and the work was, in fact, commenced at the time represented, within two weeks of the day the contract was signed (R. 20, 22). It is not suggested that he expressly warranted against interruption from unforeseen causes and, for rea-

sons set forth above, no such representation may be implied.

II

THE GOVERNMENT IS NOT LIABLE TO RESPONDENT UNDER ARTICLE 4 OF THE CONTRACT FOR DELAY CAUSED BY UNFORESEEN SUBSURFACE CONDITIONS

Although respondent had made no such contention in its petition or brief in the Court of Claims, two of the five judges of that court were of the opinion that respondent was entitled to recover under Article 4 of the contract. (R. 30, 32–33.) The other two judges comprising the majority, and Judge Madden dissenting, were of a contrary view. (R. 34–35.)

Article 4 (R. 8) was included within the contract in order to give specific expression to the intention of the parties as to what should be done in the event of discovery of unanticipated subsurface conditions. Such an express provision makes unnecessary resort to the warranties which might have been implied if the contract had been silent on the subject, and becomes the exclusive manifestation of the parties' understanding. The article provides[6] that, should "the contractor" or the

[6] Article 4 reads as follows: "Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if

Government discover subsurface conditions materially differing from those "shown on the drawings or indicated in the specifications," the contracting officer shall—

> make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 3 (R. 8), thus referred to, permits the contracting officer to require changes in specifications, and contains a similar provision as to an equitable adjustment for increases or decreases in the amount due and the time required.[7]

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he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

[7] Article 3 reads as follows: "Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date

1. Under these paragraphs, only adjustments *"resulting from"* a change in specifications are allowable. It is quite clear from this language that only the contractor whose specifications are changed is entitled to an adjustment. The reference to "the contractor" in the singular also demonstrates that the clause is concerned with the person who is a party to the contract and with his specifications, not with those of others.[8]

This interpretation of Article 4 is supported by its background. Although an owner is not ordinarily liable to a contractor for additional expense caused by unanticipated difficulties or delay, it is now settled that one who submits specifications to a contractor and requests the

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the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

[8] An evident reason for making an adjustment for differences in time resulting from a change in specifications is the penalty imposed by the contracts upon contractors who do not complete the work in the time specified. The adjustment contemplated would presumably be the saving of any penalties which would accrue because of the delay in completing the contract. The respondent in this case obviously could suffer no liquidated damages because of delayed completion of the general construction work, since his time would automatically be extended to the adjusted completion date under the general construction contract. Furthermore, such a provision for an adjustment of time enables the Government to fix a modified date for completion of the contract, from which date liquidated damages could be computed.

contractor to bid on that basis impliedly warrants the accuracy of the specifications. *United States* v. *Spearin*, 248 U. S. 132. The contractor accordingly is allowed the usual remedies for breach of contract or warranty, namely, the right to stop work in the event of a substantial breach (*United States* v. *Atlantic Dredging Co.*, 253 U. S. 1), and the right to recover damages for any losses suffered. *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234; *United States* v. *Smith*, 256 U. S. 11.

The standard form government contract, in Articles 3 and 4, allows the recovery of damages by way of equitable adjustment, rather than for breach of warranty. These articles, however, deprive the contractor of his right to cease work if the original plans cannot be followed, and leave only the right to secure an adjustment of the price. In particular, Article 4 was plainly intended to prevent abandonment of the work in the event of discovery of unforeseen subsurface conditions. There is nothing in the article to suggest an intention to enlarge the class of persons to whom the Government would have been accountable in its absence.

The basis for the implication of a warranty, in the absence of an express provision of the contract, is that the party furnishing the specifications has invited the contractor to estimate his costs and make his bid on the basis of a specifically

defined project; "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications." *United States* v. *Spearin, supra; Hollerbach* v. *United States, supra;* cf. *Simpson* v. *United States,* 172 U. S. 372; *Lentilhon* v. *City of New York,* 102 App. Div. 548, 92 N. Y. Supp. 897.

In this case the general construction contractor could rightfully rely on the specifications as to subsurface conditions as a basis for its bid for the construction of the foundation, since the nature of the soil would determine the amount of work involved in excavating and also the nature of the foundations to be constructed. This cannot be said for respondent. Certainly the plumbing, heating, and electrical contractor would not base his bid upon the specifications for the subsurface conditions which ordinarily would not, and in this case did not, affect the nature or amount of his work. Since he was not bound to follow the Government's subsurface specifications, and since such specifications had no bearing upon the work which he undertook to perform, there was no reason why the Government should have been regarded as warranting their adequacy as to him.[2]

[2] The respondent's sole interest in the work of the general contractor was as to when the construction of the foundation would be sufficiently advanced to permit commencement of respondent's own work. But it seems unreasonable to be-

Cf. *MacArthur Bros.* v. *United States*, 258 U. S. 6.

In the absence of Article 4, the Government's warranty as to subsurface specifications would have extended only to the contractor whose work was directly defined and controlled by the particular specifications involved. Inasmuch as Article 4 was not intended to enlarge the Government's liability, the scope of persons entitled to an equitable adjustment is similarly limited.[10]

2. Article 4 was included in the standard form contract adopted in 1926. It states that adjust-

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lieve that the plumbing, heating and electrical contractor would be sufficiently familiar with the work involved in excavating and laying foundations to enable him to estimate the time of performance on the basis of the physical specifications with respect to the subsurface conditions. In fact, in arriving at an estimate of the time when the progress of the general contractor's work would permit respondent to begin, respondent requested and was guided by the advice of the contracting officer. In brief, the respondent had no interest in the specifications for the foundation but only in the time of completion; and the Government could not reasonably anticipate that respondent would rely on the subsurface specifications in estimating the approximate date for the commencement of its own work.

[10] The opinion of the court below cites no decision based upon a comparable factual situation. In *Cauldwell-Wingate Co.* v. *New York*, 276 N. Y. 365, 12 N. E. (2d) 443, a 4–3 decision of the New York Court of Appeals, the contractor for the superstructure was allowed to recover damages due to the delay of the excavation and foundation contractor resulting from the inaccurate description of subsurface conditions. However, the contract specified the date when the foundations would be completed to permit the claimant to proceed and differed in other significant respects from that involved here.

ments shall be made as provided in Article 3, and Article 3 contains language very much the same as that found in Article 4. Both articles are concerned with adjustments for changes in specifications required by the Government during the progress of the work, Article 3 being general and Article 4 relating to changes resulting from the discovery of unexpected subsurface conditions. In view of the specific incorporation by reference of Article 3 in Article 4, and the similarity of language, it seems clear that the two articles should be given the same interpretation.

Numerous decisions have held that under Article 3 and predecessor clauses, where the Government reserves the right to make changes in the drawings and specifications, it is not liable for damages from delay resulting from those changes. *McCord* v. *United States*, 9 C. Cls. 155, affirmed *sub nom. Chouteau* v. *United States*, 95 U. S. 61; *Swift* v. *United States*, 14 C. Cls. 208, 14 C. Cls. 235; *Moran Bros. Co.* v. *United States*, 61 C. Cls. 73, 102; *Griffiths* v. *United States*, 74 C. Cls. 245; *Fore River Shipbuilding Co.* v. *United States*, 62 C. Cls. 307, 317; *Carroll* v. *United States*, 67 C. Cls. 513.

In *Chouteau* v. *United States, supra*, this Court held that where the delay was caused by Government change orders which were contemplated by the contract, no recovery in the nature of damages for delay might be had, saying (p. 68):

> It is very clear that both parties contemplated the probability that the work would

> not be completed at the precise period of eight months from the date of the contract. They also contemplated that changes would be made in the construction of the battery. They made such provision for these matters as they deemed necessary for the protection of each party. For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made. * * *

The Court of Claims has held that the privilege of making changes, with its implication of delay, was bought and paid for in the contract price. In *Griffiths* v. *United States, supra,* the court said (p. 255):

> The provisions of a contract authorizing changes * * * carries with it the reasonable implication that if such changes are made a delay in the prosecution of the work may result. * * * The Government can not be subjected to damages for exercising a privilege bought and paid for by it, in the absence of a showing it has abused such privilege. * * *

In *Carroll* v. *United States,* 76 C. Cls. 103, the Court of Claims said (p. 121):

> A careful consideration of the record undoubtedly establishes that the performance of changes delayed performance of the original contract work. Of course the plaintiffs may not recover for this delay.

> The contract provisions contemplated this event, and the pay provisions compensated the plaintiffs accordingly. * * *

It is our view that the reasoning and conclusions set forth above have equal application to the scope of recovery under Article 4. The language of the two articles is substantially the same and such differences as do exist import no change in meaning. Nevertheless, the Court of Claims in recent cases has held that its reasoning with respect to Article 3 is not applicable to recovery for delay under Article 4. *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461; *Sobel* v. *United States*, 88 C. Cls. 149; *Stapleton Construction Co.* v. *United States*, 92 C. Cls. 551; *Hirsch* v. *United States*, 94 C. Cls. 602; *Herbert M. Baruch Corp., Inc., Ltd.* v. *United States*, 92 C. Cls. 571; *Herbert M. Baruch Corp., Ltd.* v. *United States*, 93 C. Cls. 107.

The theory of these cases is expressed in the *Rust Engineering Co.* case, *supra*, where the court said (p. 475):

> The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such

> changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. * * *

It is submitted that these decisions are inconsistent with the decision of this court in *Chouteau* v. *United States, supra,* as well as with numerous rulings of the Court of Claims under Article 3 and similar clauses, and are incorrect. Article 4 makes it clear that changes may be made for subsurface or latent conditions differing materially from those thought to exist, and provides that the adjustment procedure established in Article 3 shall be followed. Every reason supporting the established rule in cases of changes under Article 3 exists also in the case of changes under Article 4. The only reason advanced for making a distinction is that changes under Article 3 are contemplated by the contract while changes due to subsurface or latent conditions are not so contemplated. As we have stated above, the terms of Article 4 negative that contention; it is as clearly envisaged that subsurface conditions not believed to exist may be discovered during the course of the work and necessitate changes in design and plans as it is that the Government may decide to alter the specifications of the contract under Article 3. In both cases, it is not known at the time of execution of the contract that there *will* be changes under Article 3 or 4; in both cases, it is realized and stipulated that there *may* be such changes, and suitable provision therefor is made.

Changes under Article 4 are thus within the contemplation of the parties, in exactly the same sense that changes under Article 3 are within their contemplation.

Any basis for a distinction between the scope of recovery under the two provisions is negatived by the terms of the contract. The provision in Article 4 for adjustment in case of increase of cost or time required for performance differs in no material respect from that of Article 3, and the former declares that the contract price "shall be adjusted as provided in Article 3." Thus, under the express terms of the contract, the remedy provided in the event of change orders under the two articles was intended to be precisely the same.

There is no occasion now to consider whether, as an original question, compensation for delay should be allowed. Article 4 should be construed in the light of the rule established when it was adopted. At that time, the reservation in Article 3 of the right to make changes had been held to negative any right to damages for delay caused by such changes and it seems reasonable to conclude, therefore, that Article 4 was intended to be given the same effect. The respondent may reasonably be assumed to have made its bid on this basis.

3 Regardless of plaintiff's claim to additional compensation under Article 4, he is entitled to no

recovery here because there is no showing that an appeal from the contracting officer's rejection of the claim under Article 4 was made to the head of the department, as provided in Articles 4, 3, and 15. Article 4 provides that in the event of changes thereunder the contract price "shall be adjusted as provided in Article 3 of this contract." Article 3 provides that if the parties cannot agree upon the adjustment the dispute shall be determined as provided in Article 15. Article 15 provides that all disputes concerning questions of fact arising under the contract shall be decided by the contracting officer, subject to appeal to the head of the department concerned, whose decision shall be final.

The record establishes that the plaintiff insisted that an equitable adjustment be made by the contracting officer under Articles 4 and 3 of its contract, increasing its contract price to meet the increased cost due to delay and the new conditions under which the work would have to be performed (R. 24). The contracting officer held that the contractor was entitled to no adjustment under Articles 4 and 3 (R. 24). The plaintiff did not allege, however, and the record does not show that an appeal from the contracting officer's rejection of the plaintiff's claim was made to the head of the department as required by the con-

tract. The respondent's claim should be rejected on this ground alone. It is well settled that failure to comply with the procedure provided by contract for the settlement of claims precludes a recovery by suit in the Court of Claims. *Plumley* v. *United States*, 226 U. S. 545; *Silas Mason Company, Inc.* v. *United States*, 90 C. Cls. 266; *John McShain, Inc.* v. *United States*, 88 C. Cls. 284, 297–299;[11] *Alliance Construction Co., Inc.* v. *United States*, 79 C. Cls. 730; *Lustbader Construction Co.* v. *United States*, 62 C. Cls. 549; *Fitzgibbon* v. *United States*, 52 C. Cls. 164; *Bray* v. *United States*, 46 C. Cls. 132; see *Seeds & Derham* v. *United States*, 92 C. Cls. 97, 113.

Respondent has suggested (Brief in Opposition, pp. 4–5) that the contracting officer's refusal to make an equitable adjustment under Articles 3 and 4 was a conclusion of law and that Article 15 applies only to determinations of fact. It is clear that the parties could validly agree to leave questions of the interpretation of the contract to the contracting officer, subject to appeal to the head of the department. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547. It is our view that the parties have done so here with respect to disputes under Articles 3 and 4. The provisions of Article 3 for

[11] This case involved several claims. The decision of the Court of Claims with respect to a claim which did not present a question relevant here was reversed by this court. *United States* v. *John McShain, Inc.*, 308 U. S. 512, 520.

adjustment of disputes, which are made applicable to Article 4, relate to "any claim for adjustment" (R. 8), which would seem to cover all issues and not merely issues of fact. The reference to Article 15, we believe, was intended to incorporate the appeal procedure of the latter article and not to narrow the scope of the subject matter of the appeal merely to questions of fact. Indeed, had the provision for adjustment of disputes in Articles 3 and 4 been intended to apply solely to "disputes concerning questions of fact", little purpose would be served by the adjustment provisions in Articles 3 and 4, since Article 15 would automatically have covered all disputes of fact arising under Articles 3 or 4 as well as under other provisions of the contract. Articles 3 and 4 were intended to make specific provision for modifications in the terms of the contract resulting from the discovery of subsurface or latent conditions at the site materially different from those shown in the drawings or specifications (Article 4), or changes in the specifications or drawings required for other reasons (Article 3). The provisions for adjustment contained in those Articles, in order fully to effectuate their obvious purposes of preventing stoppage of work by relegating disputes to administrative determination, must be construed as co-extensive with the scope of the Articles themselves.[12]

[12] See Government's brief in *United States* v. *Callahan Walker Construction Company*, No. 65, this Term, pp. 31–34.

III

THE ISSUANCE OF THE STOP ORDER DID NOT OF ITSELF CONSTITUTE AN ACTIONABLE BREACH OF CONTRACT

The opinion of Judge Green (R. 32), and particularly the brief concurring statement of Chief Justice Whaley and Judge Jones (R. 34), may possibly be construed to rest on the theory that the Government is liable because its contracting officer interrupted the work by issuing a stop order. A sufficient answer is that the immediate cause of the stoppage was the existence of unforeseen subsurface conditions and that the stop order merely recognized but did not cause the necessity of an interruption. And we have shown above that the Government is not liable to the respondent for delays caused by the inaccuracy of the subsurface specifications.

Moreover, Article 8 (g) of the Standard Specifications for General Conditions expressly reserves to the Government the right "to suspend any portion of the contract work wherever the Administrator [of Veterans' Affairs] deems it necessary for the purpose or advantage of the work."[11] And the contracting officer was im-

[11] The specifications, which were incorporated by reference in and made a part of the contract (R. 7), were for some reason not set forth with the contract in the printing of the record. Article 8 (g) thereof, however, was relied upon by the Government in its petition (p. 9) and its terms are not controverted.

pliedly authorized to stop the general contractor's work as an incident to the issuance of a change order under Article 4. This authority necessarily included the power to stop the respondent's work, since the latter was by the contract plainly made dependent on that of the general contractor. The exercise of an authority conferred by the contract cannot constitute an actionable breach of contract. Respondent, therefore, cannot claim compensation for damages caused by the issuance of a stop order under Articles 8 (g) or 4 in the absence of some contractual undertaking by the Government to give compensation. We have shown above, however, that Article 4, the only provision which could possibly be deemed to embody such an undertaking, provides no basis for recovery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~982~~ 31

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

FRED J. RICE AND W. CAMERON BURTON, Receivers for D. C. ENGINEERING COMPANY, INC.

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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STATEMENT.

Respondent respectfully represents that the petition for a writ of certiorari to the Court of Claims in the above cause should be denied, as the findings and conclusions of the majority of the Court below are entirely in accord with the decisions of this Court and do not announce any novel or far reaching extension of the law of contract applicable alike to the Government and its contractors, as alleged by petitioner.

Nor does the reasoning of the respective Judges in reaching their conclusions as to the item of delay for which recovery was allowed show any diversity or contrariety of

opinion regarding the point decided and the award made. The majority opinion of Judge Littleton was concurred in by Judges Green and Jones and Chief Justice Whaley, and Judge Green found additional support for the findings and conclusions of the Court in other sections of the contract.

QUESTIONS PRESENTED ARE NOT INVOLVED IN THIS PROCEEDING.

Counsel for the Government seem to regard this case as a sort of Procrustean bed victim, which may be stretched or contracted to fit the questions which they desire to have this Court consider. The fact is that neither of the questions presented, as stated in the petition, is involved in this proceeding.

First Question Presented.

The first question is stated as follows:

> "Whether the United States impliedly warrants that the time for completion specified in a standard form Government construction contract is adequate for the performance of the contractor's work."

In its findings of fact and conclusions of law, the Court of Claims confined plaintiffs' recovery to the sum of $9,349.95, the total extra costs resulting from the stoppage of the work specified in the contract due to 126 days delay "for which plaintiff was in no wise responsible". For the remaining delay and certain other items of plaintiffs' claim, totalling $16,694.69, the defendant was held not responsible. (Op. R. pp. 24-25)

As stated in the summary of facts by petitioner, plaintiff Company was officially notified by the Government to proceed as provided by the contract, (Find. 3, R. 20) and thereafter work was stopped by order of the Government's Contracting Officer because of faulty foundations, (Find. 5, R. 23) forcing a suspension of work by plaintiff Company for

approximately four months. (Find. 7, R. 24). The extra costs found by the Court below to be due plaintiff Company were made up of expenses accruing during this period of suspension and increased costs resulting from the necessity of performing the major portion of its work during the winter months rather than in the spring and summer (Find. 7, R. 25), as contemplated by the contract. (Find. 4, R. 20-21)

The discovery of the faulty foundations necessitated a complete relocation of the hospital building (Find. 5, R. 23), and while the construction contractor was given an *increase* in its contract, in the amount of $68,360.57, for "extra work and delay" resulting from the change, (Find. 5, R. 24) plaintiff Company, under separate contract with the Government to make the plumbing, heating and electrical installations, was given change orders *decreasing* its contract in the net amount of $1,121.00. (Find. 9, R. 26)

Plaintiff Company was denied an increase for its "extra work and delay", because of the erroneous decision of the Contracting Officer, who ruled that no adjustment could be made in the contract of plaintiff Company as no work had been performed under it at the time the change was made, and plaintiff Company was given the alternative by the Contracting Officer of giving up the job and forfeiting its bond or proceeding under the existing contract and filing claim for its excess costs in the Court of Claims. (Find. 6, R. 24)

Obviously, under these circumstances, the question of the Government's warranty of the sufficiency of the time provided for the completion of the contract is not involved. The question was not before or decided by the Court below, and it is not properly presented for review by this Court.

Second Question Presented.

The petition states the second question presented as follows:

> "Whether Article 4 or any other provision of a standard form Government construction contract obli-

gates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of another contractor on account of unforeseen subsurface conditions."

What has been said above would seem sufficient to demonstrate that this question, like the first, is not involved in the proceeding. More specifically, however, all of the plans and specifications were included in one volume and made a part of each of the contracts (Find. 1, R. 17), and the relocation of the building necessitated many changes in the plans and specifications as they related specifically to the work to be done by plaintiff Company. (Find. 9, R. 26)

Plaintiff Company's claim for which the lower Court has given judgment is not for losses suffered as the result of "changes in the plans and specifications of another contractor", but for the damage resulting from the delay caused by the Government in the prosecution of the work of plaintiff Company under its own contract. (Op. R. 31) The question would be exactly the same if there had not been a co-contractor on the job.

This Court many times has passed upon the Government's responsibility for such delays, *United States* v. *L. P. and J. A. Smith*, 256 U. S. 11, citing *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234; *United States* v. *Spearin*, 248 U. S. 132, and *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, and at least once has refused to consider the question again upon review from the Court of Claims,—*Allen Pope* v. *United States*, 75 Ct. Cls. 436, certiorari denied 288 U. S. 610.

Likewise, the question of the alleged failure of plaintiff Company to appeal from the decision of the Contracting Officer, which petitioner, in the footnote to its second question presented, says it will urge if certiorari is granted, was never raised in the Court below and is not involved in the proceeding. The responsibility to plaintiff Company of the Government for the delay caused by it, forming the basis

of the award by the Court below, did not in any manner depend upon or relate to any question of fact determinable by the Contracting Officer under the provisions of the contract.

CONCLUSION.

The lower Court correctly has construed the contract in suit as making the Government responsible for a portion of the delay for which it is accountable. If by doing so it has developed a weakness in the form of contract which the Government ordinarily employs, then the standard form should be reframed to meet future cases as they arise, and the solemnly executed agreement of the parties in this case should not be distorted to meet conditions which were not contemplated.

As Judge Littleton pointed out, if the Government desired to relieve itself from responsibility to contractors for excess costs such as here, for which the contractor was in no wise responsible, it should have so provided in the instrument.

It is respectfully submitted that the petition for a writ of certiorari to the Court of Claims should be denied.

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R. AUBREY BOGLEY,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1942.

No. 31

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

FRED J. RICE AND W. CAMERON BURTON, RECEIVERS FOR D. C. ENGINEERING COMPANY, INC.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
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R. AUBREY BOGLEY,
Counsel for Respondents.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

SHORT STATEMENT OF THE CASE.

Respondents brought suit in the Court of Claims of the United States as Receivers for The D. C. Engineering Company, Inc., hereinafter referred to as Respondent, to recover excess costs incurred by that Company as the result of delays caused by the Government incident to the construction of the Veterans' Administration Hospital building at Togus, Maine, in the years 1932 and 1933.

Judgment in favor of Respondents in the amount of $9,349.95 was entered by the Court of Claims December 1, 1941 (R. 36), and the petition of the Government for a writ of certiorari was granted by this Court April 13, 1942.

STATEMENT OF FACTS.

While we agree, with minor exception, with the statement of facts contained in the brief for the United States (Br. pp. 2-8), the essential facts will be here briefly restated for convenient reference.

Respondent's contract with the Government called for the installation of all plumbing, heating and electrical equipment in the Hospital building (R. 20). An independent contract was made by the Government with Charles Smith & Sons, called the General Contractor, for the general construction work, including particularly the excavation for foundations and the erection of the building proper (R. 19). There was no privity of contract between the two Contractors, although Respondent's work was necessarily to proceed along with that of the General Contractor (R. 12, 19) and was to be completed not later than the time provided for completion in the contract for General Construction.

Although the contract for General Construction provided for completion within 250 days after May 9, 1932, the date of notice to proceed, or by January 14, 1933, the building was not finished and finally accepted by the Government until October 1, 1933, a total of 510 days as against the originally contemplated 250 days, or 260 days late (R. 19-20, 25, 27). This delay resulted primarily, if not solely, from the discovery of unsatisfactory subsurface conditions, which necessitated a complete relocation of the building (R. 23).

Pursuant to the provisions of the contract, the Government, on May 12, 1932, gave Respondent notice to proceed, stating that:

> "It will be noted that the contract provides for completion of the work at a date not later than that pro-

vided for in the contract for General Construction. The General Construction work is due for completion within 250 Calendar Days after May 9, 1932" (R. 20).

After receipt of advice from the General Contractor that its work would be sufficiently progressed by June 6, 1932, to enable Respondent to commence work under its contract, Respondent's Superintendent moved to and established headquarters at the job on June 6, 1932, having shipped large quantities of tools and equipment to the job shortly prior thereto (R. 22-23).

Respondent then, and only then, learned that unsatisfactory subsurface conditions had been discovered. "Instead of finding proper foundation bearings, as shown on the drawings and as stated in the specifications", the Government discovered soft sand, water and quicksand and on or about June 4th, the Contracting Officer stopped all work pending decision on a remedy for the situation (R. 23).

Following conferences with the General Contractor and Respondent, the Contracting Officer determined to relocate the building and proceed with the construction work despite the approaching winter weather. At such conferences, Respondent protested to the Contracting Officer that it should not be required to proceed with the work called for by its contract without the payment of extra compensation for the delays and increased costs under the circumstances, and insisted that an equitable adjustment be made by the Contracting Officer under the terms of the contract to meet such increased costs (R. 24).

The Contracting Officer ruled, however, that as no actual work on the building had been performed by Respondent up to the time that work under the General Contract was stopped on June 4, 1932, "no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff (Respondent) would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor

and make claim in the United States Court of Claims for any excess costs incurred" (Find. 6, R. 24).

New plans and drawings were prepared for the relocation of the building and excavation for the new foundations was commenced by the General Contractor August 9, 1932 (R. 23). The General Contractor had not made sufficient progress to enable Respondent to commence its work until October 8, 1932 (R. 24).

As the result of this delay, the major part of Respondent's work was thrown in the severe winter months, whereas under the original schedule of construction, the building would have been under cover before the rigorous winter weather set in, and the efficiency of Respondent's mechanics and laborers engaged in the plumbing and heating work was reduced 50 per cent during that period by reason of having to work in the open in the freezing and subfreezing weather (R. 25).

At the time of preparing its bid and prior to the execution of its contract, Respondent conferred with the Contracting Officer concerning the time when construction would commence and the period of the year during which it would be prosecuted and was advised by him that work would be commenced as early in the spring of 1932 as weather conditions permitted so that the building would be under roof and enclosed before cold weather set in during the following months (R. 21).

Following the relocation of the Hospital building site, made necessary by the faulty subsurface conditions, the contract of the General Contractor was amended by various change orders, resulting in a net increase in that contract of $103,489.49 and an extension of 212 days, to August 14, 1933, for completion, the largest item in such change orders being one for "extra work and *delay*" in the amount of $68,360.57, with an extension of 125 days (R. 24).

Certain plumbing and heating fixtures were eliminated by the relocation of the building, and the Contracting Officer issued various change orders amending Respondent's con-

tract resulting in a net reduction of $1,121.18, that is from $89,500 to $88,378.82 (R. 26).

By stipulation filed in the Court below and as found by that Court, the cost to Respondent of performing its contract, including overhead and profit, was $114,423.46, or $26,044.64 in excess of the amended contract price of $88,378.82 (Find. 10, R. 26).

The Court found that the lowered efficiency of Respondent's mechanics working in the open during the winter months resulted in additional labor costs to Respondent of $5,192.49; that the salary of Respondent's Superintendent for the period of 126 days from June 4, 1932 to October 8, 1932, was $1,170, and that during this delay period of 126 days Respondent's actual overhead expenses, exclusive of profit and the above mentioned salary of its Superintendent, was $2,987.46 (R. 25).

OPINIONS OF THE COURT BELOW.

The Court awarded judgment in favor of Respondent in the sum of $9,349.95, the total of the foregoing amounts (R. 32).

In the main opinion, written by Judge Littleton, it is stated that the difference of $13,621.61 between Respondent's total loss of $26,044.64 and the amount of the judgment resulted from inadequate estimates of labor and material costs and the failure to secure the ordinary discounts because of its financial condition (R. 31-32), although there is not even a suggestion of such facts in any of the numerous special findings of fact made by the Court.

It also should be noted that while the judgment includes an allowance for additional *labor costs* caused by the inefficiency of the workmen during the winter months, no allowance whatever was made for the additional time thereby required for the completion of the contract and the Superintendent's salary, overhead, etc. which Respondent was required to bear for that additional time.

Of the 260 extra days required for the completion of the contract, the Government contended, and the Court found, that 48 days delay was caused jointly by the General Contractor and Respondent (R. 25-26), leaving 212 days for which extensions were granted because of changes in the specifications by the Government. The judgment below included an allowance to Respondent for its superintendence, overhead, etc. for the period from June 4, 1932 to October 8, 1932, of 126 days, but nothing for the additional 86 days.

Judge Littleton found that Respondent's contract and specifications, considered in connection with the representations in the specifications relating to the General Contractor, made the Government liable for Respondent's excess costs which resulted from conditions for which Respondent was not responsible and which it was not required to take into consideration in submitting its bid, and that in accordance with Article 4 of the contract, the Government was bound to make an equitable adjustment of Respondent's excess costs resulting from the discovery of the unsatisfactory subsurface conditions (R. 29).

The basis of Judge Littleton's opinion is not, as the Government seems to contend, the purely negative proposition that the Government is liable for delays because nothing in the contract relieves it of such a liability. At the outset (R. 27), the opinion succinctly states the reasoning by saying:

> "Under the facts disclosed by the record in this case, the provisions of plaintiff's contract, the representations of the contracting officer as to the period during which the general construction work would be performed, and the statements and representations in the specifications and drawings relating to all work upon the entire project, upon all of which plaintiff had a right to rely and did rely in making its bid, we are of opinion that plaintiff is entitled to recover $9,349.95 of the total excess cost of $26,044.64 incurred."

The following cases are then cited:

United States v. *Smith*, 94 U. S. 214, 217.
Mueller v. *United States*, 113 U. S. 153, 156.

Dermott v. *Jones*, 23 How. 220, 231, 233.
O'Brien v. *Miller*, 168 U. S. 287, 297.
Green County, Ky. v. *Quinlan*, 211 U. S. 582, 594.
American Surety Co. v. *Pauly* (No. 1), 170 U. S. 133, 144.
United States v. *Spearin*, 248 U. S. 132.
Wood v. *Fort Wayne*, 119 U. S. 312, 321, 322.

The opinions in these cases and especially the passages appearing on the pages to which Judge Littleton refers, show that the basis of the lower Court's judgment may be summarized as follows:

Taking the contract as a whole in the light of all of the circumstances out of which it developed,[1] and construing it most strongly against the Government, which prepared it,[2] and in the light of the rule that one party may not with justice accept the benefit of performance without paying for it,[3] the United States is responsible for defects in the specifications which it prepared and which the contractor was bound to rely upon and follow,[4] and is liable for the delay in performance caused by such defects, having thus without justification interfered with the performance of the original contract within the time stated.[5]

Judge Green, in his concurring opinion, agreed with all of the conclusions of Judge Littleton, but made the further observation that in his opinion the Government was liable to Respondent for all excess costs resulting from the stop order of June 4, 1932, of the Contracting Officer, which constituted a breach of the contract, the time of completion be-

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[1] *O'Brien* v. *Miller*, 168 U. S. 287, 297; *Green County, Ky.* v. *Quinlan*, 211 U. S. 582, 594.

[2] *American Surety Co.* v. *Pauly*, (No. 1), 170 U. S. 133, 144. See also *Garrison* v. *United States*, 7 Wall. 688; *Marietta, Mfg. Co.* v. *United States*, 73 Ct. of Cls. 528, 546; *Bethlehem Steel Co.* v. *United States*, 51 Ct. of Cls. 394, 398, Aff'd. 246 U. S. 523.

[3] *Dermott* v. *Jones*, 23 How. 220, 231, 233.

[4] *United States* v. *Spearin*, 248 U. S. 132; *Wood* v. *Fort Wayne*, 119 U. S. 312, 321, 322.

[5] *United States* v. *Smith*, 94 U. S. 214, 217; *Mueller* v. *United States*, 113 U. S. 153, 156.

ing one of the specifications thereof and described as being of the essence, and that in any event, the Contracting Officer failed in his duty to make an equitable adjustment under Article 3 or 4 of the contract (R. 32-33).

Chief Justice Whaley and Judge Jones concurred in the first part of Judge Green's opinion, but expressed the belief that Articles 3 and 4 of the contract had no application (R. 47).

Judge Madden dissented on the ground that the Government should not be held responsible for Respondent's excess costs due to delay "which was no one's fault," (apparently disregarding the finding that instead of "proper foundation bearings, *as shown in the drawings and as stated in the specifications*, soft sand, and a great deal of water and quicksand were encountered" (R. 23)), and that there was no obligation on the part of the Contracting Officer to make an equitable adjustment in favor of Respondent because of the necessary changes made in the specifications having "reference only to the contractor whose work is directly affected by the discovery of the unexpected condition" (R. 34-35), (although all of the specifications were made a part of Respondent's contract (R. 7)).

SUMMARY OF ARGUMENT.

I. The United States warranted the adequacy of its plans and specifications for the construction of the Hospital building and is liable in breach of contract for damages resulting from errors in such specifications. The specifications and drawings relating to foundation bearings admittedly were erroneous and resulted in stoppage of work, preparation of new plans and drawings, relocation of the building and delay in construction, with consequent damages to Respondent.

II. Article 4 of the contract required the Contracting Officer to adjust any increase in Respondent's costs resulting

from the discovery of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications". Such conditions were discovered, but the Contracting Officer erroneously ruled as a matter of law that no adjustment should be made under the contract. Respondent was not required to appeal this decision to the head of the Department under Article 15 of the contract, providing for appeals on "questions of fact", and its right to such adjustment was properly submitted to and determined by the Court of Claims.

III. While the Contracting Officer had power to stop the work, the Government is not relieved of liability for consequent damages where the exercise of such power was made necessary by the Government's fault in setting out erroneous specifications.

I.

GOVERNMENT LIABLE FOR EXCESS COSTS WHEN SPECIFIED TIME FOR COMPLETION IS EXTENDED FOR CAUSE FOR WHICH IT IS RESPONSIBLE.

The damages awarded Respondent by the Court of Claims flowed from errors in the specifications as to foundation bearings (R. 23) and the consequent stoppage of work and relocation of the building. That the Government is responsible for such errors and liable in contract for resulting damages follows as an inevitable conclusion, as this Court many times has held.

Cases and text authorities cited by the Government at page 14 of its brief refer to situations where erroneous specifications were not involved, and are squarely distinguished in *United States* v. *Spearin*, 248 U. S. 132, 135, 137, 138, where Justice Brandeis, speaking for the Court said:

> "The general rules of law applicable to these facts are well settled. Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be

excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day* v. *United States*, 245 U. S. 159; *Phoenix Bridge Co.* v. *United States*, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil. *Simpson* v. *United States*, 172 U. S. 372; *Dermott v. Jones*, 2 Wall. 1. *But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. MacKnight Flintic Stone Co.* v. *The Mayor*, 160 N. Y. 72; *Filbert* v. *Philadelphia*, 181 Pa. St. 530; *Bentley* v. *State*, 73 Wisconsin, 416. See *Sundstrom* v. *New York*, 213 N. Y. 68."

* * *

"But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate."

* * *

"The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume the work."

* * *

"When the Government annulled the contract without justification, it became liable for all damages resulting from its breach."

This rule has been followed in other cases involving like circumstances:

Hollerbach v. *United States*, 233 U. S. 165.
Christie v. *United States*, 237 U. S. 234.
United States v. *Atlantic Dredging Co.*, 253 U. S. 1.
United States v. *Smith*, 256 U. S. 11.

Having made specifications for the foundations, the Government expressly promised in Article 4 of the contract to make good any increased costs which might result from the discovery of materially different subsurface conditions, but even without such an express promise, the Government

would be liable for damages caused by the interruption of Respondent's work, for which it was directly responsible.

United States v. *Smith*, 94 U. S. 214.
Mueller v. *United States*, 113 U. S. 153.

In this case, the Government, by the terms of its contract, did not absolve itself from liability for damages resulting from delays caused by it, as it has in some cases. See *Wood* v. *United States*, 258 U. S. 120.

Respondent Was Prepared to Perform Its Contract Within Time Specified.

In the invitation for bids issued by the Government, which was incorporated in the Specifications (pp. 5a-6a, Def. Exh. H) bidders, including Respondent, were advised that "time of performance will be an essence of the contract", and the Court below so found (Find. 1, R. 18, 19).

Respondent's contract provided that:

> "The work shall be commenced promptly after date of receipt of notice to proceed and shall be completed at a date not later than that provided for in the contract for General Construction" (R. 7).

and the General Contract provided that:

> "The work shall be commenced within ten (10) calendar days after date of receipt of notice to proceed and shall be completed within two hundred and fifty (250) calendar days after date of receipt of notice to proceed" (R. 19).

Notice to proceed was given to the General Contractor May 9, 1932, and to Respondent May 12, 1932. In the latter notice, Respondent's attention again was directed to the essential character of the time element of the contract as follows:

> "It will be noted that the contract provides for completion of the work at a date not later than that provided for in the contract of General Construction. The

General Construction work is due for completion within 250 Calendar Days after May 9, 1932" (R. 20).

Pursuant to advice from the General Contractor that its work would be sufficiently progressed by June 6, 1932, for the commencement of Respondent's work, Respondent moved large quantities of materials and supplies to the job and its Superintendent moved to the job on that date (R. 22-23). On "about June 4" (Saturday), all work on the project had been stopped by order of the General Contractor because of the discovery of subsurface conditions "*materially differing from those shown on the drawings and set forth in the specifications*" (R. 23).

The specifications relating to excavation and foundation work provided that the contractor would "do all necessary excavating *to the dimensions and levels shown on drawings*" (R. 22), but these dimensions and levels proved to be inadequate and insufficient because of the subsurface conditions (R. 23), necessitating the preparation of new plans and drawings and moving the "location of practically the entire building" (R. 23).

The Court below specifically found that:

> "Plaintiff (Respondent) was ready to proceed and perform the *work called for by its contract* at all times on and after the date on which it received notice to proceed." (Find. 4, R. 21.)

This finding follows immediately additional findings in the same paragraph that Respondent before submitting its bid, "being aware of the importance to it of the period for performance," sought the advice of the Contracting Officer and was informed by him "that construction work would commence in the early spring of 1932 as soon as weather conditions would permit so that the building would be under roof and enclosed before cold weather set in during the following months," and that Respondent "made its bid in reliance upon that advice and upon the basis of the provisions of the standard form of contract and the specifications" (R. 20-21.)

Obviously, the finding that Respondent was ready at all times to perform the "*work called for by its contract,*" especially when considered in connection with the findings immediately preceding it relating to time of performance, could only mean that Respondent was prepared to perform its contract within the time specified. This it was prevented from doing by the stop order of the Contracting Officer made necessary by the erroneous specifications for foundation excavation which were prepared by the Government.

In the face of these circumstances, the United States in its brief makes what we believe may be not too harshly described as an absurd statement, that:

> "It is apparent from the contract and offer together that time was considered essential only as to the contractor's agreement to build and not as to any promise by the Government. Cf. *Werner* v. *Zintsmaster*, 61 F. (2d) 298 (C. C. A. 3)" (Br. pp. 13-14.)

The *Werner* case relates to a contract which did not contain a clause that time was of the essence, but did provide that "time of payment shall be an essential part of the contract." In this circumstance, the Circuit Court of Appeals for the Third Circuit very properly held that the parties by the very language employed indicated that the time element was regarded as of the essence only with respect to "time of payment" by the vendee and not to the vendor's engagement to convey.

Time of the Essence of the Contract.

The authorities seem to agree that the question of whether or not time is to be considered of the essence and if so, to which or both of the parties it is to relate, must be gathered from the intention of the parties as expressed by the entire contract.

Bidders having been advised that time was to be of the essence, the instant contract simply states the period of performance, without any indication, as the United States would have this Court assume, that it was a one way obliga-

tion of the Contractor, without any obligation whatsoever on the part of the Government for fixing the time of performance.

Whatever doubt may exist in the matter, however, is dispelled by the provisions of Articles 3 and 4 of the contract, hereinafter more fully discussed, providing that the Contracting Officer *shall* make an "equitable adjustment" of the amount due under the contract and (or) the *time* of performance where changes are made in the drawings or specifications within their general scope (Art. 3, R. 8) and that the cost and (or) difference in *time* resulting from changes in specifications or drawings made necessary by the discovery of subsurface conditions materially differing from those shown in the original specifications or drawings, *shall* be equitably adjusted (Art. 4, R. 8).

If, as Government counsel assert, the Government assumed no responsibility for the fixing of the time of performance, there would be no reason for the mandatory provisions of Articles 3 and 4 of the contract, obviously inserted to protect the Contractor where it was prevented from performing within the specified time by changes or conditions for which the Government was responsible.

Government Warranted that Respondent's Work Under Its Contract Would Not Be Delayed by the Government.

Later in its brief, the Government, after referring to its reserved right to make changes in the plans and specifications (without referring to the corresponding duty to equitably adjust the costs and additional time of performance resulting therefrom) states that:

> "This is a strong indication that the Government was not guaranteeing respondent that the general contractor would complete his work at the time originally specified" (Br. p. 17).

While the Government *may* not have guaranteed to Respondent that the General Contractor would complete his work within the 250 days, it did guarantee to Respondent

that if the General Contractor's time of performance was extended for reasons for which the Government was responsible and Respondent's time was correspondingly extended (it running concurrently with that of the General Contractor), an equitable adjustment would be made in Respondent's "costs", as well as in its time limitation.

The Government urges in one breath that the two contracts must be considered together, when it argues that the Respondent knew its work must proceed in harmony with the general construction and that Respondent thereby contemplated that it would be affected by delays in the work of the General Contractor, and in the next breath, it contends that the two contracts are separate and distinct, when it argues that Respondent had no occasion to rely upon specifications which related to work to be performed by the General Contractor.

In either event, we submit, the responsibility of the Government to Respondent remains the same. If the contracts are joint and inseparable, Respondent had the right to rely upon the sufficiency of the Government's specifications covering excavations and the Government would be directly responsible to Respondent for its excess costs caused by the insufficiency of those specifications. On the other hand, if the two contracts are to be considered wholly unrelated, Respondent had the right to look to the Government, acting through the General Contractor as its agent, to perform the General Construction work without delay and within the time fixed by Respondent's contract or compensate it for its extra costs resulting from any delays in such performance.

Crook Co. vs. United States.

Counsel for the Government again cites and quotes at length from the opinion in *Crook Co.* v. *United States*, 270 U. S. 4. The Court of Claims in the instant case and in many other cases, however, has very properly distinguished the *Crook* case because of the most unusual provisions of the contract there involved.

In that case, this Court held that the Government did not "bind itself to a fixed time for the work to come to an end" and to pay damages for delays extending that period caused by a co-contractor, but the following excerpts taken from the short opinion show clearly that, contrary to the instrument now before the Court, the contract there involved contained many provisions which definitely indicated that the Government assumed no liability with respect to the completion date. This Court said:

> "It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed."
>
> • • • • • • • • • •
>
> "But it was obvious on the face of the contract that this date was provisional."
>
> • • • • • • • • • •
>
> "The contract showed that the specific buildings referred to were in process of construction by contractors *who might not keep up to time.* 'The *approximate* contract date of completion for the foundry' is stated to be March 17, 1918, and that for the machine shop, February 15, 1918."
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> • • • • • • • • • •
>
> "But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, *is not without a bearing on what the contract bound the Government to do.*"
>
> • • • • • • • • • •
>
> "The plaintiff agreed to accept in full satisfaction *for all work done under the contract* the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes,"
>
> • • • • • • • • • •
>
> *"The contract price, it is said in another clause, shall cover all expenses of every nature connected with the work to be done."*

Respondent Had the Right to Rely Upon the Representations of Contracting Officer.

The time of year when the instant contract was to be performed was quite material in view of the extreme winter weather experienced in Maine, the site of the project. It is not questioned that the representations of the Contracting Officer in this regard materially affected the bid of Respondent, as well as those of all other bidders. All bids would have been higher if outside construction work during the winter months had been contemplated, and this would have resulted in a higher construction cost to the Government. Certainly the Government does not wish to have contractors disregard such representations in all cases and increase their bids by amounts which would take care of such an eventuality.

Concerning similar representations, Judge Green in the case of *M. H. McCloskey* v. *United States*, 66 Ct. of Cls. 105, 127, after quoting the exception to the parol evidence rule as follows:

> "The rule admitting parol evidence of a collateral agreement is especially applicable where such agreement constituted a part of the consideration of the written agreement, or operated as an inducement for entering into it. * * *"

went on to say:

> "This rule seems to us particularly applicable in the case at bar. Strictly speaking, the parol agreement upon which plaintiff bases its case was a distinct agreement from the written contract, although collateral thereto. It does not vary any of the terms of the written agreement, although in one sense it may be said to enlarge them. The written contract provided that the work was to 'commence' when the site was completely cleared and completed within ten months after the work was begun. If the contract was plain and unambiguous as to the time when the site was to be cleared or the time when the work was to be begun, parol evidence could not be received to contradict it, but such is not the

> case, and we believe parol evidence to be competent to show the inducement to the contract, for certainly the statements made to McCloskey were an inducement to the contract."

This language is equally applicable to the present case and we submit is a correct statement of the law on the subject.

The Government states that these "representations • • • cannot be regarded as warranties of the uninterrupted continuity of the work" (Br. p. 20). It is not so contended by Respondent. We do contend, however, that Respondent did have the right to rely upon such representations in submitting its bid, which later was reduced to a contract.

In any event, the contract for General Construction provided that the work was to consume 250 days and in accordance with the notice to proceed given by the Government was to commence May 9, 1932, and if the work of the General Contractor, as well as that of Respondent, had not been interrupted by causes for which the Government was responsible, the "Hospital building • • • would have been under roof and generally enclosed before the beginning of cold and winter weather in 1932-1933" (R. 24-25), as originally represented by the Contracting Officer.

The breach of contract for which the Government must respond took active form on or about June 4, 1932, when the insufficiency of the Government's specifications and drawings for excavation work was discovered and it became necessary to stop all work, and Respondent is entitled to recover for all damages naturally flowing from that breach, which necessarily includes the increased cost of performing its work in the winter months.

II.

THE GOVERNMENT IS LIABLE TO RESPONDENT UNDER ARTICLE 4 OF THE CONTRACT FOR DELAY RESULTING FROM IMPROPER EXCAVATION SPECIFICATIONS.

Article 4[1] of *Respondent's* contract provided that "should * * * the Government discover * * * subsurface * * * conditions at the site materially differing from those shown on the drawings or indicated in the specifications, * * * the contracting officer shall * * * make such changes * * * as

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[1] Articles 3 and 4 are here quoted in full for convenient reference.

"Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed."

"Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

he may find necessary, and any increase or decrease of *costs* and (or) difference in time resulting from such changes *shall* be adjusted as provided in Article 3 of this contract." The Court below found (R. 30), and the United States does not contend to the contrary, that subsurface conditions were discovered by the Government materially differing from those shown on the drawings and indicated in the specifications. Although a substantial adjustment was made in favor of the General Contractor for its "extra work and delay" caused by this error in the specifications, the United States contends that no adjustment of Respondent's corresponding increased costs can or should be made because the drawings and specifications involved related only to the work to be performed by the General Contractor.

At this point, the Government chooses to treat the two contracts as unrelated and wholly independent of each other. The statements made elsewhere in its brief that "the performance of the claimant is made dependent on that of other contractors"; that "Respondent was to finish at a date not later than that fixed in the General Construction contract and to fit its work to that of the other contractors" (Br. p. 16), and that Respondent's work "was by contract plainly made dependent on that of the general contractor" (Br. p. 37), are disregarded at this stage of the argument.

Breach of Warranty Admitted by Government.

The Government admits that it was liable to the General Contractor for breach of warranty because of the erroneous specifications and cites authorities which fully support that admission, but urges that the warranty did not relate specifically to Respondent's work and therefore can not form the basis of an equitable adjustment under Article 4 of the contract in favor of Respondent.

The fact is that Respondent's work and the time of its performance were wholly dependent upon the progress of the work of the General Contractor and Respondent was

specifically admonished by the provisions of Article 13 of the contract that it must "carefully fit his (its) own work to that provided under other contracts as may be directed by the Contracting Officer".

In the face of these specific provisions in the contract, the Government sees fit to urge, wholly without foundation we submit, that the Respondent should not have had the slightest interest in or concern about the specifications relating to the work to be performed by its co-contractor, and that there is no obligation on the part of the Government to see that Respondent's increased costs, resulting *directly* from the faulty specifications, are equitably adjusted or otherwise compensated for, because such specifications, although closely related to Respondent's work, especially as to date of commencement and time of performance, did not by their terms specifically "affect the nature or amount of his (its) work" (Br. p. 26).

Distinction Between Articles 3 and 4 of the Contract.

The Government cites a number of decisions of the Court of Claims holding that claimants may not recover damages for delays resulting from changes contemplated by Article 3 of the standard form of contract (Br. p. 28), and complains that in another group of cases that Court has found claimants entitled to recover for delays resulting from changes under Article 4 (Br. p. 30), and urges that the two Articles in all essentials are identical and should be similarly construed.

Article 3 relates to changes within the *general scope* of the drawings and specifications and provides for an equitable adjustment in the *amount due under the contract.*

Article 4, however, deals with subsurface and latent conditions *materially differing from those shown or indicated in the plans and specifications* and provides that any increase or decrease in cost (as contrasted with amount due under the contract) "shall be adjusted as provided in Article 3".

In this manner, Article 4 incorporates only the procedural provisions of Article 3 and not its provisions as to the contractor's right to adjustment. For this, we must look to the substantially different provisions of Article 4 alone, which *refer*, not to contemplated changes covered by Article 3, but to unforeseen changes which could not be taken into account in estimating bids.

The distinction between the two Articles is perhaps best and most succinctly described by the Court of Claims in its opinion, quoted in the Government's brief, in *Rust Engineering Co.* v. *United States*, 86 Ct. of Cls. 461, 475, as follows:

> "The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. * * *" (Br. pp. 30-31.)

Certainly the discovery of the unexpected subsurface conditions, the necessity for completely relocating the building, the preparation of new plans and drawings, the extra time consumed in excavating for the new foundations and the necessity for proceeding with the outside work during the winter months, were not within the contemplation of the Government or Respondent at the time its contract was executed, and Respondent had every right to believe that if such unforeseen conditions arose, its cost resulting therefrom (not the amount due under its contract) would be equitably adjusted.

There was never any attempt to reach a conclusion between Respondent and the Contracting Officer as to the *amount* of Respondent's increased costs, for the reason that when Respondent timely, and within the procedural re-

quirement of Article 3, incorporated into Article 4 by reference, protested that it should not be required to proceed with the work under its contract unless and until an equitable adjustment of its costs was made, the Contracting Officer ruled that:

> "as no actual construction work had been performed by it under its contract up to that time no adjustment in the contract price by way of extra allowances could be awarded and that plaintiff (Respondent) would either have to give up its contract and forfeit its bond or complete the work as called for under its contract as the building was made ready therefor, and make claim in the United States Court of Claims for any excess costs incurred" (R. 24).

With this ruling, Respondent chose the logical alternative and proceeded with its work, subject to the right to present its claim for increased costs to the Court of Claims upon completion of the contract.

Respondent could have regarded the contract as breached when its work was stopped due to the faulty specifications and it was refused an equitable adjustment of its extra costs caused thereby, thereafter litigating its claim for damages in the Court of Claims. *United States* v. *Spearin*, 248 U. S. 132. Contrary to the contention of the United States (Br. p. 25), it would not have been prevented from so doing by the terms of Article 3;

> "But nothing provided in *this* Article shall excuse the contractor from proceeding with the prosecution of the work so changed,"

such provision having reference only to reasonably anticipated changes contemplated in Article 3 and not to changes caused by unusual and unexpected conditions referred to in Article 4.

It is also said that the Court of Claims decisions holding the Government liable for delays resulting from changes under Article 4 of the standard form of contract are con-

trary to the decision of this Court in *Chouteau v. United States*, 95 U. S. 61, 68. In that case, this Court found that claimant was not entitled to losses sustained as the result of a rise in labor and material prices in the period following a delay caused by changes in specifications which were reasonably contemplated by the parties, saying:

> "It is one of the elements which he takes into account when he makes his bargain, and he cannot expect the other party to guarantee him against unfavorable changes in those prices."

A rise in labor and material costs, which might well have been a reduction of such costs instead, depending upon general economic conditions, is a gamble to which both parties to all construction contracts are exposed. But that is a far different thing from out of pocket costs directly resulting from and relating to changes in the specifications, necessitated by unusual and unexpected conditions, referred to in Article 4 of the standard form of contract.

Respondent Not Precluded from Recovery by Failure to Appeal to Head of Department.

It is urged by the United States in this Court, for the first time, the point not having been presented to or decided by the Court below, that Respondent is precluded from recovering for failure to appeal in writing to the head of the department within 30 days from the decision of the Contracting Officer, as provided in Article 15 of the contract.

Article 4 provides that increased costs shall be adjusted in accordance with the procedure outlined in Article 3, as above set forth, and Article 3 provides that if the parties cannot agree upon the adjustment, the dispute shall be determined as provided in Article 15.

However, Article 15 provides as follows:

> "Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning *questions of fact* arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the

> contractor within thirty days to the head of the department concerned, whose decision shall be final and conclusive upon the parties thereto as to such *questions of fact.* In the meantime the contractor shall diligently proceed with the work as directed." (R. 12.)

It will be noted that both the necessity for appeal to the head of the department and the finality of his decision relate only to decisions of the Contracting Officer on *questions of fact.* Obviously, the parties to the contract have not agreed that *questions of law* involved in rulings of the Contracting Officer must be appealed to the head of the department and that the determination of such questions by the head of the department shall be *final and conclusive,* and Respondent, by consenting to that provision of the contract, certainly has not precluded itself from securing a proper determination by a court of law on questions of law arising under its contract.

In this connection, it must be borne in mind that the question decided by the Contracting Officer and now before this Court is not *what* adjustment should be made under Article 4 of the contract, but whether or not the contract permitted the making of *any* adjustment. The Contracting Officer ruled, with what we think is obvious error, that *no* adjustment could be made in favor of Respondent, because Respondent at the time work was suspended by his order had not performed any work under its contract (R. 24), presumably meaning that it had not physically made any installations in the building, although considerable preliminary work had been done (R. 22-23). It would be assumed from this ruling that had Respondent made even the slightest installation under its contract, the Contracting Officer would have made an equitable adjustment of Respondent's costs resulting from the delay incident to the relocation of the building. However, the Government does not found its contention upon the reason given by the Contracting Officer, but insists that no equitable adjustment should be made in favor of Respondent, regardless of whether or not its work had been commenced prior to the stop order.

The question of the application of Article 15 in the standard form of contract to circumstances similar to those here involved has been fully presented to and decided by the Court of Claims in the case of *Callahan Walker Construction Co.* v. *United States*, No. 43102 (decided January 5, 1942) and now before this Court for review.

In a well reasoned opinion written by Judge Green in that case, the Court of Claims finds that the procedure outlined in Article 15 for appeal to the head of the department relates only to questions of fact and not to questions of law, and that the determination of whether or not under the terms of the contract an equitable adjustment is to be made is a question of law. Judge Green says:

> "We think it has been shown above that he was not deciding a question of fact and that his order cannot be so construed. He did, in effect, assert that the contract rate applied to the additional work ordered but this involved a question of law which he had no authority to decide. We have also held above that he not only did not make an equitable adjustment but made no adjustment whatever."
>
> . . . . . .
>
> "As no adjustment was made of the additional cost, the plaintiff under all of the authorities was not obliged to take an appeal or even to protest and without an appeal could bring suit to recover on an implied contract the reasonable value of the work. The plaintiff, however, did protest against the decision of the contracting officer that payment would be made under the contract rate."

As Judge Green also points out, this Court in two recent cases, *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 114, 115, 119, and *Securities Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 452, has held that what constitutes an "equitable adjustment" is a question of law, and if that is so, certainly the question of whether or not under the terms of a statute or under the conditions of a contract as here, any adjustment is to be made is more certainly a question of law.

It would indeed be unfortunate, and we submit totally unwarranted, to hold that the parties to a contract, by inference and an involved process of reasoning, have ousted the Courts of jurisdiction to determine questions of law arising out of a contract and have relegated themselves unqualifiedly to the acceptance of the decision of a Contracting Officer and the head of a Department in matters requiring judicial consideration and determination.

III.

GOVERNMENT'S POWER TO ISSUE STOP ORDER DID NOT RELIEVE IT OF LIABILITY FOR THE BREACH OF WARRANTY.

As a final contention (Br. p. 36), the Government says that it should not be liable because Article 8(g) of the Standard Specifications authorized the suspension. The *power* to suspend was undoubtedly present. In fact, not to suspend in the face of "soft sand, and a great deal of water and quicksand" would have been folly. But this exercise of the Government's *power* to suspend does not relieve it of liability either under general law or under Article 4 of the contract, to adjust the increase in Respondent's costs. The Government is still responsible for the defect in specifications which made the suspension necessary and for Respondent's resulting damage.

CONCLUSION.

It is therefore respectfully submitted that the Court of Claims correctly awarded damages to Respondent for the Government's breach of its contract and that the judgment of the Court of Claims should be affirmed.

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pp. 6+5

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1942.

The United States of America, Petitioner, *vs.* Fred J. Rice and W. Cameron Burton, Receivers for D. C. Engineering Company, Inc.	On Writ of Certiorari to the Court of Claims.

[November 9, 1942.]

Mr. Justice Black delivered the opinion of the Court.

We granted certiorari to review a judgment against the United States by the Court of Claims, 95 Ct. Cls. 84, interpreting a widely used standard form construction contract in a manner alleged to be in conflict with this Court's interpretation of an analogous contract in *Crook* v. *United States*, 270 U. S. 4.

Respondent agreed to install plumbing, heating, and electrical equipment in a Veterans' Home to be erected at Togus, Maine, while another contractor was to do the general work of preparing the site and constructing the building. Respondent agreed, for a stipulated price, to begin work upon notice to proceed and to finish by the time the work had been completed by the principal contractor. If respondent failed to complete the work within the time thus set, the government was entitled to terminate the contract or to require the payment of liquidated damages. The length of time allowed the principal contractor under his contract, subject to certain qualifications discussed below, was 250 days, and it was into this schedule that respondent was to coordinate his own activity.

The government gave notice to the general contractor to begin work on May 9, 1932. On May 12, respondent was notified to begin and early in June its superintendent arrived in Maine with tools and equipment. Upon his arrival he found that the general contractor had been stopped by the government because of the unexpected discovery of an unsuitable soil condition. It became necessary to change the site of the building and to alter the specifications, and because of the delay attendant upon preparing a new

foundation, respondent was unable to begin work until October. As a consequence, overhead expenses accumulated during the period of delay, and much of the work which respondent's employees otherwise would have done either during warm weather or after the building was enclosed was done outside in cold weather.

Because of the delay and pursuant to the adjustment clauses of the contract the government extended the time of performance by respondent and because of structural changes, it re-adjusted the amount due. It increased payments to the principal contractor, reduced the payment to respondent by about $1,000 because of construction economies under the new plans, and waived any claim to liquidated damages for the period of the extension. The hospital was completed some months after it would have been finished had it not been for the change of plan.

The respondent was paid the full amount agreed on for the work it did. It then sued for about $26,000 for damages alleged to have been suffered due to delay for which the government was responsible. The Court of Claims held the government was liable for damages resulting solely from delay, but found that $13,600 of the alleged loss was due to respondent's own faulty estimate and financial conditions, and that $3,000 of it was caused by respondent's and the principal contractor's delays. Respondent sought no review of denial of this part of its claim. However, the court concluded that the balance claimed, $9,349, arose from overhead costs during the summer of 1932 when the new foundation was being prepared and from a decrease in labor effectiveness resulting because much of the work had to be done outside in cold weather. The judgment rendered under this conclusion is what we have before us.

The chief issues of the case are whether the delay in commencing the construction was a breach of contract by the government; whether, regardless of the answer to that question, respondent was entitled to an equitable adjustment for damages resulting from the delay, in addition to the extension of time already granted; and whether respondent is barred from any recovery because he failed to appeal certain decisions affecting his contract to the chief officer of the department. Under the view we take of the first two of these questions, it is unnecessary to answer the third.

I

The government contends, as it did in the *Crook* case, *supra*, that the change in specifications resulting in delay was not a breach

of the contract, but in accordance with its terms; that the extent of its obligation for permitted changes was fixed by the contract; and that for delay the government was required to do no more than grant an extension of time. Put another way, the government concedes that if an alteration of plan required respondent to use an extra 50 tons of steel, the government would be liable for the value of the steel and the cost of installation; but it argues that under the terms of this contract an extension of time should be accepted as full equitable adjustment for all damages caused by the fact that the work was done at the later period made necessary by the permitted change. Essentially it repeats the doctrine of *Chouteau* v. *United States*, 95 U. S. 61, 68: "For the reasonable cost and expenses of the changes made in the construction, payment was to be made; but for any increase in the cost of the work not changed, no provision was made."

We agree with this view. We do not think the terms of the contract bound the government to have the contemplated structure ready for respondent at a fixed time. Provisions of the contract showed that the dates were tentative and subject to modification by the government. The contractor was absolved from payment of prescribed liquidated damages for delay, if it resulted from a number of causes, including "acts of Government" and "unusually severe weather." The government reserved the right to make changes which might interrupt the work, and even to suspend any portion of the construction if it were deemed necessary. Respondent was required to adjust its work to that of the general contractor, so that delay by the general contractor would necessarily delay respondent's work. Under these circumstances it seems appropriate to repeat what was said in the *Crook* case, that "When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied." *H. E. Crook Company, Inc.* v. *United States*, *supra*, 6. Decisions of this Court prior to the *Crook* case also make it clear that contracts such as this do not bind the government to have the property ready for work by a contractor at a particular time. *Wells Bros.* v. *United States*, 254 U. S. 83, 86; *Chouteau* v. *United States*, *supra*; cf. *United States* v. *Smith*, 94 U. S. 214, 217.

As pointed out, the delay here resulted from a change in specifications made necessary by discovery of soil unsuitable for foundation purposes. The government having reserved the right to make such changes upon discovery of "subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated by the specifications", delays incident to the permitted changes cannot amount to a breach of contract. If there are rights to recover damages where the government exercises its reserved power to delay, they must be found in the particular provisions fixing the rights of the parties.

II. Two of the Judges of the Court of Claims thought consequential damages resulting from delay were recoverable under paragraphs 4 and 3 of the contract. These paragraphs[1] deal with closely related problems. Article 3, entitled "Changes", governs the procedure under which the government may alter the specifications of the contract for general causes. Article 4, entitled "Changed Conditions", governs the procedure under which the government may alter the contract to meet unanticipated physical conditions. Article 4 incorporates by reference the same machinery of adjustment as that specified in article 3. Both clauses essentially provide that if changes are made affecting an increase or decrease of cost or affecting the length of time of performance, an equitable adjustment shall be made.

Clearly questions of interpretation in clauses so similar should, if possible, be resolved in the same fashion in each of them. Clause 4 was added to the standard form contract since clause 3, and we therefore turn first to decisions interpreting the latter clause. The

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[1] "Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. . . .

"Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract."

Court of Claims, relying on principles announced in the *Chouteau*, *Wells*, and *Crook* cases, *supra*, has uniformly held that the "increase or decrease of cost" language in Sec. 3, and in similar clauses, is not broad enough to include damages for delay; that "It was never contemplated . . . that delays incident to changes would subject the government to damage beyond that involved in the changes themselves." *Moran Bros.* v. *United States*, 61 Ct. Cls. 73, 102; and for the same view, see *McCord* v. *United States*, 9 Ct. Cls. 155, 169; *Swift et al.* v. *United States*, 14 Ct. Cls. 208, 231; *Griffiths* v. *United States*, 74 Ct. Cls. 245, 255.

Were this a matter of first impression, we would again come to the same conclusion regarding this clause. It seems wholly reasonable that "an increase or decrease in the amount due" should be met with an alteration of price, and that "an increase or decrease . . . in the time required" should be met with alteration of the time allowed; for "increase or decrease of cost" plainly applies to the changes in cost due to the structural changes required by the altered specification and not to consequential damages which might flow from delay taken care of in the "difference in time" provision. The provision as to time serves the large purpose of removing from persons in the position of respondent liability for "delay" beyond the stipulated date for which ~~it~~ they might otherwise have ~~its~~ their contract terminated or might be required to pay liquidated damages without fault.

Despite the similarity of the two clauses, a minority of the court below has in this instance concluded that they may be distinguished and that respondent is entitled to damages for delay under clause 4. In supporting this view, respondents here rely primarily on *Rust Engineering Co.* v. *United States*, 86 Ct. Cls. 461, 475, where the court below distinguishes the two clauses by saying that the type of change contemplated in clause 4 is more basic than that under clause 3, and that therefore different liabilities should attach:

> "The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contem-

plation of either party to the contract at the time it was made. . . . ."

And see *Sobel* v. *United States*, 88 Ct. Cls. 149, 165.

No such strained distinction between paragraphs 3 and 4 can stand. It does not help to argue that the changes made under clause 4 "are not within the contemplation of either party", since the changes made under clause 3 are also not contemplated in advance. Both clauses deal with changes made necessary by new plans or new discoveries made subsequent to the signing of the contract. For delays incident to such unanticipated changes, the contractor was under either section to be granted a "compensating extension of time." *Wells* v. *United States, supra*, 86.

In this case there were two consequences of the discovery that the Home could not be built as originally planned. One was an alteration of specifications, which resulted in slight cut in respondent's outlay and in his compensation. The other was the delay itself and for this the time necessary to perform the contract was equitably adjusted by extension, thereby relieving respondent of liquidated damages which could otherwise have been imposed. Under the terms of the contract, it is entitled to no more.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.